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and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 96–79)

ANNOUNCEMENT OF SUSPENSION OF COLLECTION OF SPECIAL TONNAGE TAXES AND LIGHT MONEY UPON ENTRY INTO THE UNITED STATES OF VESSELS OF UKRAINE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces that the United States has determined that the Government of Ukraine has ceased discriminating against vessels of the United States in the collection of certain fees and taxes from such vessels which enter that country. As a consequence, it has become possible to suspend the collection of special tonnage taxes and light money from vessels of Ukraine upon entering United States ports.

EFFECTIVE DATE: The change discussed in this notice became effective on November 14, 1996.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton, Office of Regulations and Rulings (202) 482–7040.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton denominated "light money", on all foreign vessels which enter United States ports (46 U.S.C. App. 121 and 128). Vessels of a foreign nation may, however, be exempted from the payment of such special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on United States vessels or their cargoes (46 U.S.C. App. 141). The list of nations whose vessels have been found to be reciprocally exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money is found at § 4.22, Customs Regulations (19 CFR 4.22). Nations granted these commercial privileges that subsequently impose discriminatory duties are subject to retaliatory suspension of the commercial privileges (46 U.S.C. App. 141 and 142).

The list of countries in 19 CFR 4.22 is compiled as the result of international agreements between the United States and the govern-

ments of those nations listed. Customs either adds or deletes the names of countries only upon the request of the Department of State. The present list includes the former Union of Soviet Socialist Republics (USSR) and, following the dissolution of that country, Customs was guided by a policy determination of the Department of State which holds that absent a separate agreement to the contrary, the states emerging from the break-up of the USSR take the same rights and obligations as existed for the USSR.

By a letter received on September 16, 1996, Customs was informed by the Department of State that the Government of Ukraine was assessing discriminatory tonnage fees against vessels of the United States which enter at Ukrainian ports. As a consequence, the Department of State requested that action be taken to end the exemption from the assessment of special tonnage taxes and light money extended to Ukrainian vessels entering United States ports. Normally, Customs would be supplied with the names of countries to add to or delete from the regulatory list, but since discussion with other former Soviet states was on-going, it was determined to issue a non-amendatory notice by which to limit the exemption privilege by excluding Ukraine. The Department of State informed Customs that upon the conclusion of necessary discussions, Customs would be formally requested to add the names of certain countries to 19 CFR 4.22, and to delete the USSR from the regulation.

Therefore, effective immediately upon publication of a September 26, 1996, General Notice, vessels of Ukraine entering ports of the United States were no longer exempted from the assessment of special tonnage taxes and light money. Special tonnage taxes and light money in the amounts authorized under law were collected on all such vessels.

Customs has now been informed by the Department of State that appropriate written assurances have been supplied by the Government of Ukraine, indicating that vessels of the United States will be accorded the treatment called for under the Maritime Agreement which expired in December of 1995. Accordingly, it has been requested by the Department of State that for a period of thirty days from the date of notification to the Customs Service, vessels of Ukraine have restored to them the statutory exemption from the collection of special tonnage taxes and light money.

Therefore, effectively immediately upon publication of this General Notice, and for a period of thirty calendar days which will expire on December 14, 1996, vessels documented under the laws of Ukraine are exempted from the collection of special tonnage taxes and light money.

Dated: November 15, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, November 21, 1996 (61 FR 59278)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
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Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

(Slip Op. 96–179)

VEROSOL USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–10–00697

[Defendant's motion for an amendment of the decision granted, defendant's motion for reconsideration of the judgment denied.]

(Dated November 5, 1996)

Lamb & Lerch (David R. Ostheimer, Sidney H. Kuflik, of counsel) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *Amy M. Rubin,* Civil Division, Dept. of Justice, Commercial Litigation Branch, Attorneys for the Defendant; *Chi S. Choy, Myron P. Barlow* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel for defendant.

ORDER

POGUE, *Judge:* Upon reading defendant's motion for an amendment of the decision and reconsideration of the judgment in this case; and upon consideration of other papers and proceedings had herein; it is hereby

ORDERED that defendant's motion for an amendment to the decision of this Court in *Verosol USA, Inc. v. United States,* slip op. 96–167 (October 8, 1996) is granted and page 3 of the opinion is hereby amended by deleting the following sentences:

> In 1994, the port of Philadelphia granted several of plaintiff's protests and allowed plaintiff to enter its fabrics under subheading 5907.00.90. Customs later reconsidered those decisions and instructed the port and plaintiff that all future entries of the fabric were to be liquidated under 5407.60.20, HTSUS. Plaintiff again filed protests, but this time Customs denied them. This denial is the subject of this test case.

And it is further

ORDERED that, as the deleted material did not factor into the Court's decision, defendant's motion for reconsideration of the judgment is hereby denied.

(Slip Op. 96–180)

MIAMI FREE ZONE CORP., PLAINTIFF *v.* FOREIGN-TRADE ZONES BOARD, DEPARTMENT OF COMMERCE, AND UNITED STATES, DEFENDANTS, AND WYNWOOD COMMUNITY ECONOMIC DEVELOPMENT CORP., INC. AND DADE FOREIGN TRADE ZONE, INC., DEFENDANT-INTERVENORS

Court No. 93–06–00324

Plaintiff challenges the *Remand Determination* of the United States Foreign-Trade Zones Board providing an explanation for its granting defendant-intervenor Wynwood Community Economic Development Corporation, Inc. the right to establish, operate and maintain a general-purpose foreign-trade zone in the Miami Customs port of entry. *See Remand Determination: Miami Free Zone Corporation v. United States,* 93–06–00324.

Held: Plaintiff's challenges are rejected and the Court finds the Foreign-Trade Zones Board's grant to the Wynwood Community Economic Development Corporation, Inc. was within the scope of its authority, is supported by substantial evidence on the record, and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Foreign-Trade Zones Board's grant to defendant-intervenor is sustained and the action is dismissed.

(Date November 7, 1996)

Sandler, Travis & Rosenberg, P.A., Miami, FL, *(Gilbert Lee Sandler, Edward M. Joffe, Arthur K. Purcell),* for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert, Carla Garcia-Benitez); Robert J. Heilferty,* Attorney-Advisor, Office of the General Counsel, United States Department of Commerce, of Counsel, for defendants.

Hogan & Hartson L.L.P., Washington, D.C., *(Lewis E. Leibowitz, David G. Leitch, Timothy C. Stanceu, Joanne L. Leasure),* for defendant-intervenors.

OPINION

CARMAN, *Chief Judge:* Miami Free Zone Corporation[1] (MFZC) challenges the Foreign-Trade Zones Board's (FTZB or Board) *Remand Determination* which explains the Board's basis for granting defendant-intervenor Wynwood Community Economic Development Corporation, Inc. (Wynwood or WCEDC) the right to establish, operate and maintain a third general-purpose foreign-trade zone (FTZ) within the Miami Customs port of entry. *See Remand Determination: Miami Free Zone Corporation v. United States,* 93–06–00324 *(Remand Determination).* Plaintiff asserts the Board's grant is not supported by substantial evidence on the record, and therefore must be reversed. Defendant and defendant-intervenors urge this Court to affirm the Board's *Remand Determination.* This Court has jurisdiction under 28 U.S.C. § 1581(i)(1), (4) (1988) and, for the reasons given below, upholds the Board's *Remand Determination* finding it is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and that the Board's *Remand Determination* is supported by substantial record evidence.

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[1] Miami Free Zone Corporation (MFZC) operates FTZ No. 32, one of two general-purpose foreign-trade zones in the Miami Customs port of entry area. A second general-purpose FTZ in the Miami Customs port of entry area, FTZ No. 166, is located in Homestead, Florida. *See Miami Free Zone Corp. v. United States,* 914 F. Supp. 620, 622 n. 2 (CIT 1996); *see also Remand Determination: Miami Free Zone Corporation v. United States,* 93–06–00324 *(Remand Determination)* at 1.

BACKGROUND

This case is presently before the Court after remand to the Foreign-Trade Zones Board. *See Miami Free Zone Corp. v. Foreign-Trade Zones Board,* 914 F. Supp. 620 (CIT 1996) *(Miami Free Zone I).* In *Miami Free Zone I,* plaintiff challenged the FTZB's granting Wynwood the authority to establish, operate and maintain a general purpose foreign-trade zone in the Miami Customs port of entry. Plaintiff requested the Board's grant be vacated and the matter remanded so that an evidentiary hearing could be held concerning the creation of a FTZ in Wynwood, Florida. Plaintiff asserted the Board's failure to hold an evidentiary hearing on the creation of an additional FTZ in the Miami Customs port of entry violated plaintiff's right, under the Fifth Amendment's Due Process Clause, to a hearing before its property interest in FTZ No. 32 was diminished. Additionally, plaintiff asserted the Board's grant violated the statutory requirement that an existing FTZ be found inadequate to serve the "convenience of commerce" before an additional FTZ could be created in the same Customs port of entry. *See* 19 U.S.C. § 81b(b) (1988). Finally, plaintiff asserted the Board's failure to offer it a right of first refusal to operate the FTZ in Wynwood precluded the Board from finding FTZ No. 32 inadequate to serve the convenience of commerce.

While the Court in *Miami Free Zone I* denied plaintiff's request for a remand in order to hold an evidentiary hearing, it did order a remand of the Board's grant. The Court determined a remand was necessary because "the Court [could not] ascertain * * * what factors served as the basis for the Board's approval of the Wynwood application, and * * * [could not] discern whether the Board performed the appropriate statutory analysis [in approving the grant]." *Miami Free Zone I,* 914 F. Supp. at 629. Accordingly, the Court remanded the Board's decision in order to provide the Board an opportunity to "explain fully its basis for approving the Wynwood application and point out what evidence on the record it relied upon in reaching that determination." *Id.* at 630.

The *Remand Determination,* dated February 8, 1996, identifies four factors which the Board relied on in granting WCEDC the authority to operate a FTZ in Wynwood. Those factors are: (1). the growing demand for international trade and FTZ services resulting from increased levels of international trade in the Port of Miami entry area; (2). the need for FTZ services in the Wynwood area; (3). the competitive effect on existing FTZs that is expected to result from the creation of a FTZ in the Wynwood area; and (4). the support for establishing a FTZ in the Wynwood area expressed by local and state officials. The *Remand Determination* asserts the findings with respect to these four factors satisfy the Board's statutory obligations in creating an additional FTZ in the Miami Customs port of entry, and therefore the Board's grant to WCEDC should be affirmed by this Court.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

The Miami Free Zone Corporation asserts the evidence relied upon in the Board's *Remand Determination* does not support the Board's finding FTZ No. 32 inadequate to serve the convenience of commerce. Specifically, plaintiff raises six objections to the Board's *Remand Determination.* First, plaintiff asserts the Board's *Remand Determination* should not be upheld because it fails to rely on record evidence in reaching its determination. Plaintiff argues that while the Board's *Remand Determination* cites to the Examiner's Report, it fails to cite to the administrative record, making it "impossible to identify what assertions are supported in the record by evidence and what assertions are not." (Pl's Comm. in Opp'n to Remand Determ. at 2.)

Second, plaintiff asserts the failure of the Board's *Remand Determination* to "mention—must [sic] less assess or evaluate—the adequacy of FTZ 32 services" constitutes a fatal flaw requiring reversal of the Board's determination. *(Id.)* In arguing that its FTZ serves the convenience of commerce, plaintiff asserts FTZ No. 32 has met fully the need for FTZ activities within the Port of Miami, and notes that MFZC has expressed its capacity and willingness to expand to meet the need for additional FTZ services in the Miami Customs port of entry.

Third, plaintiff contends the Board's *Remand Determination* must be reversed because it relies on irrelevant facts and unsupported assertions. Plaintiff challenges the four findings the Board relied on in concluding FTZ No. 32 is inadequate to serve the convenience of commerce,[2] noting they are "not relevant to the question of the services available under FTZ No. 32 and their adequacy to serve the convenience of commerce." *(Id.* at 3.) Plaintiff asserts the issue raised by this case is "not whether additional zone activity should be authorized in Wynwood," but rather "whether an additional grant is needed within the port." *(Id.* at 4 (emphasis omitted).)

Fourth, plaintiff argues there is no evidence in the administrative record supporting the Board's determination that FTZ No. 32 could not serve the convenience of commerce. Specifically, plaintiff asserts several of the Board's findings are irrelevant to its conclusion that FTZ No. 32 is inadequate to serve the convenience of commerce. Plaintiff challenges, as contrary to "both the statute and the long-standing practice," the Board's conclusion that FTZ No. 32 is inadequate to serve the convenience of commerce because it is not located within the city limits of Miami and because it is further from the seaport than the Wynwood zone. *(Id.* at 5.) Additionally, plaintiff asserts the Board's reliance on a survey of 190 businesses which revealed interest in an additional FTZ in Wynwood was inappropriate because the survey did not address the ade-

[2] As a basis for its conclusion that FTZ No. 32 was inadequate to serve the convenience of commerce, the Board noted: (1) international trade is increasing in the Port of Miami; (2) the desire for zone services in the Wynwood area has been expressed; (3) FTZ No. 32 would not experience significant competitive effects from the creation of a FTZ in Wynwood; and (4) officials of the state and local governments support efforts to promote economic development in Wynwood. *(Remand Determination* at 3–8.)

quacy of the existing services available at FTZ No. 32. Plaintiff also argues the Board's observation that international trade is growing in Miami is irrelevant to its conclusion that FTZ No. 32 is inadequate to serve the convenience of commerce. Finally, plaintiff claims Wynwood's application for a general purpose zone and the Board's approval of a thirteen acre FTZ is at odds with Wynwood's desire to provide processing and manufacturing capabilities for large-scale users.

Fifth, plaintiff asserts three of the other findings in the Board's *Remand Determination* are legally irrelevant in determining whether FTZ No. 32 adequately serves the convenience of commerce. Plaintiff argues the Board's reliance on WCEDC's promise not to duplicate the services available in FTZ No. 32 is inappropriate. Additionally, plaintiff criticizes the Board's consideration of the local political support for creating a FTZ in Wynwood and the defendant-intervenors' assertion that the Wynwood zone would focus on the concerns of the community. Plaintiff argues these three findings are legally irrelevant because they do not address the statutorily imposed test of whether FTZ No. 32 is serving the convenience of commerce.

Finally, plaintiff asserts the Board's grant fails to give appropriate weight to record evidence indicating that the convenience of commerce will not be served by the creation of an additional FTZ in Wynwood. Plaintiff asserts "the existing, operating zone represents a substantial private investment in the community which has served as a significant contributor to the growing international trade economy in South Florida since 1979. Authorization of the Wynwood grant will only result in servicing trade indistinguishable from the trade serviced by FTZ 32, will cause dislocations of trade within the port, and will accomplish this at public expense." (Pl's Comm. in Opp'n to Remand Determ. at 9–10.)

B. *Defendants*:

In response, defendants assert MFZC has failed to demonstrate the *Remand Determination* is arbitrary or capricious, an abuse of discretion, or contrary to law and therefore it should be affirmed. Defendants argue the *Remand Determination* should be affirmed because the Board carefully evaluated the facts presented by the Wynwood application and articulated an explanation for its decision which is rationally related to the facts found. Specifically, defendant notes that in considering Wynwood's application the Board took into account: the volume of trade flowing through the port of Miami and the increasing demand for international trade and FTZ services; the Wynwood community's need for FTZ services; the effect creation of a FTZ in Wynwood would have on FTZ No. 32 and the FTZ in Homestead; and the support expressed by local and state officials for the creation of an additional FTZ in Wynwood.

Additionally, defendants assert the Board's "'sufficiently reasonable' [interpretation of the statute] should be treated with deference by this Court." (Fed. Defs.' Reply to Pl.'s Comm. in Opp'n to Remand Determ. (Fed. Def's Reply) at 3 (quoting *American Lamb Co. v. United States*, 785

F.2d 994, 1001 (Fed. Cir. 1986)).) The Board notes "convenience of commerce" is not defined by the statute, and that "[w]here Congress has not spoken on the proper interpretation of a phrase, 'it is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable.'" (Fed. Def's Reply at 3 (quoting *U.H.F.C., Co. v. United States*, 916 F.2d 689, 698 (Fed. Cir. 1990)).)

Finally, the Board challenges several comments and claims made by plaintiff in its submissions to this Court. Defendant asserts MFZC's claim that the approval of additional general purpose FTZs within a port of entry involve "'very particular, special needs or agreement among the grantees,' is carefree in its failure to cite any support or basis in fact." (Fed. Defs' Reply at 4 (quoting Pl's Comm. in Opp'n to Remand Determ. at 4).) Additionally, defendants challenge MFZC's claim that the Board's standard practice is to approve one grant per port. Defendants also assert MFZC's comments mischaracterize the Board's reliance on the growth of international trade in Miami as the sole justification for the grant of an additional zone, when it was only one factor the Board relied on in reaching its decision. Finally, defendants claim MFZC's statement that manufacturing activities are prohibited in the Wynwood zone is misleading. Defendants contend the Wynwood FTZ would be authorized to engage in manufacturing activities after notifying the Board for approval.

C. *Defendant-Intervenors:*

Defendant-Intervenors raise three arguments in support of the Board's *Remand Determination*. First, defendant-intervenors argue the *Remand Determination* should be sustained because the Board has broad authority to administer the Foreign Trade Zone Act. In support of this argument, defendant-intervenors note that "the Board[ ] [has] a 'wide latitude of judgment * * * to respond to and resolve the changing needs of domestic and foreign commerce through the trade zone concept.'" (Def.-Intervenors' Resp. to Pl's Comm. in Opp'n to Remand (Def.-Intervenors' Resp.) at 2 (quoting *Miami Free Zone I*, 914 F. Supp. at 629 (quoting *Armco Steel Corp. v. Stans*, 431 F.2d 779, 788 (2d Cir. 1970)).)

Second, defendant-intervenors claim substantial evidence supports the Board's grant to Wynwood. Defendant-intervenors argue the Board did consider whether FTZ No. 32 adequately serves the convenience of commerce. In support of this position, defendant-intervenors note the *Remand Determination*'s consideration of the distance between the seaport and FTZ No. 32 as well as the 190-company survey's conclusion that "existing foreign-trade zone facilities in the Miami area are not fully serving the needs of the ocean freight-related activity near the Port of Miami ." *(Id.* at 3 (quoting *Remand Determination* at 5).)

Finally, defendant-intervenors assert plaintiff's concession of the need for zone operations in Wynwood justifies sustaining the Board's *Remand Determination*. Defendant-intervenors argue "[p]laintiff's

self-proclaimed desire and 'willingness to expand' negates its own argument that FTZ 32 is adequate to serve the convenience of commerce," and "[t]his concession demonstrates that the Board properly approved the Wynwood grant." (Def.-Intervenors' Resp. at 5.)

STANDARD OF REVIEW

The standard of review this Court will apply in reviewing decisions of the Board is set forth in *Conoco, Inc. v. United States,* 855 F. Supp. 1306, 1310–11 (CIT 1994) *(Conoco III). See also Conoco, Inc. v. United States,* 885 F. Supp. 257, 262 (CIT 1995) *(Conoco IV)* (reiterating the standard of review set forth in *Conoco III), aff'd sub nom. Citgo Petro. Corp. v. U.S. Foreign Trade-Zones Bd.,* 83 F.3d 397 (Fed. Cir. 1996); *Phibro Energy, Inc. v. Brown,* 886 F. Supp. 863, 868 (CIT 1995) (same). Based on the standards prescribed by 5 U.S.C. § 706, this "Court must first 'decide whether the [Board] acted within the scope of [its] authority' in order to determine whether the Board's action violated § 706(2)(C)." *Conoco III,* 855 F. Supp. at 1311 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971) (further citation omitted)) (bracketed text inserted in *Conoco III).* If this Court determines the Board acted within the scope of its authority, "the Court may then consider whether the Board's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' in violation of § 706(2)(A)." Id. (quoting 5 U.S.C. § 706(2)(A) (1988) and *Citizens to Preserve Overton Park,* 401 U.S. at 416, 91 S.Ct. at 823).

DISCUSSION

This Court has recognized previously the Board's "'wide latitude of judgment * * * to respond to and resolve the changing needs of domestic and foreign commerce through the trade zone concept.'" *Miami Free Zone I,* 914 F. Supp. at 629 (quoting *Armco Steel Corp. v. Stans,* 431 F.2d 779, 788 (2d Cir. 1970). Nevertheless, this Court will sustain only those determinations where (1) "the [Board] acted within the scope of [its] authority"; and (2) "the Board's action was [not] 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 627.

A. *The Board's Statutory Authority:*

The statutory language establishing the Board's powers clearly authorizes the Board to create multiple FTZs within the same Customs port of entry. The Foreign Trade Zone Act provides:

> Each port of entry shall be entitled to at least one zone, but when a port of entry is located within the confines of more than one State such port of entry shall be entitled to a zone in each of such States, and when two cities separated by water are embraced in one port of entry, a zone may be authorized in each of said cities or in territory adjacent thereto. *Zones in addition to those to which a port of entry is entitled shall be authorized only if the Board finds that existing or authorized zones will not adequately serve the convenience of commerce.*

19 U.S.C. § 81b(b) (1988) (emphasis added). Accordingly, the Court will turn to the question of whether the Board's conclusion that existing FTZs within the Miami Customs port of entry do not adequately serve the convenience of commerce[3] is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with law.

B. *The Convenience of Commerce:*

While this Court previously noted "[d]efendant's briefs to this Court do appear to marshal sufficient and appropriate evidence supporting the Board's approval of the Wynwood application," the Court remanded the Board's grant because "no such evidence [was] discussed or pointed out * * * in the *Wynwood Grant.*" *Miami Free Zone I,* 914 F. Supp. at 629. In reviewing the four factors presented by the Board in support of its conclusion that the existing FTZs within the Miami Customs port of entry do not serve the convenience of commerce, the Court finds the Board's grant to Wynwood is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is supported by substantial record evidence.

The Board's first basis for its conclusion the existing FTZs do not serve the convenience of commerce is the high level of international trade passing through the Miami Customs port of entry and the rising demand for international trade services. The Examiner's Report, adopted by the FTZB in the Wynwood grant, notes "[o]ther major U.S. port communities have multiple zone projects and the level of international trade in Miami implies a high level of demand for zone services and provides a general basis for the consideration of approving additional zone services for an area." *(Remand Determination* at 3 (quoting P.R. 105 at 9–10).)

The Court notes the statutory language requires the Board to make a finding that an existing FTZ "will not" serve the convenience of commerce. *See* 19 U.S.C. § 81b(b) (1988) (authorization of additional FTZs is appropriate "only if the Board finds that existing or authorized zones will not adequately serve the convenience of commerce"). Based on the present levels of international trade passing through the Miami Customs port of entry and the projected growth in trade, the Board's determination that "the convenience of commerce [in the Miami port of entry] would be served by a higher level of zone services" *(Remand Determination* at 4.) is reasonable. "Although this [Court's] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). Therefore, the Court finds the Board's determination that the existing FTZs are not adequate to serve the convenience of commerce due to the rising

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[3] The Board "adopted the findings of the examiner that the existing zones would 'not adequately serve the convenience of commerce' and the conclusion that 'there is adequate evidence of the need for the additional zone project to serve the convenience of commerce in the Miami Customs Port of Entry area.'" *(Remand Determination* at 1–2.)

demand for international trade services is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Second, the Board's *Remand Determination* asserts the existing FTZs are inadequate to serve the convenience of commerce with respect to cargo shipped into and out of the Miami seaport complex. The *Remand Determination* notes Wynwood is located within two miles of the Miami seaport, while FTZ No. 32 is approximately fourteen miles from the seaport. Additionally, the *Remand Determination* refers to a study commissioned by WCEDC which surveyed 190 companies and found "existing foreign-trade zone facilities in the Miami area are not fully serving the needs of the ocean freight-related activity near the Port of Miami." (*Remand Determination* at 5 (citing P.R. 105 at 7).) The study also noted that "while the majority of FTZ 32's incoming shipments arrive at the port, most leave from the airport. Wynwood is seeking to attract users whose inbound and outbound shipments require ocean freight." (*Remand Determination* at 5 (quoting P.R. 105 at 9).)

The Court finds especially relevant the expressed desire for additional FTZ services, particularly services made available by a FTZ located proximately to the Miami seaport, made by companies which are not current tenants in FTZ No. 32. Accordingly, the Court finds the Board's determination that the existing FTZs are inadequate to serve the convenience of commerce, based on the expressed desire for FTZ services located proximately to the Miami seaport, is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The third basis for the Board's grant to Wynwood discussed in the *Remand Determination* is the determination that the creation of an additional FTZ in Wynwood would have little or no competitive effect on existing FTZs. In reaching this conclusion, the Board considered the possibility that the creation of an additional FTZ in the Miami Customs port of entry would result in the duplication of FTZ services. The *Remand Determination* notes "[t]he examiner reported to the Board that the focus of the Wynwood zone would differ from that of FTZ 32 by 'provid[ing] zone services for the Wynwood community and the related economic development project.'" (*Remand Determination* at 6 (quoting P.R. 105 at 10).) The Examiner's Report found the services offered in Wynwood were not intended to duplicate zone services already available in the Miami area, although the examiner did concede there might be some small degree of overlap.

Similar to the analysis above, the Court notes the *Remand Determination*'s observation that "[o]f the several companies identified by WCEDC as prospects, none are tenants of the existing zones." (*Remand Determination* at 6–7 (quoting P.R. 105 at 9).) The Court finds the Board's determination that the existing FTZs are inadequate to serve the convenience of commerce based on its conclusion the Wynwood FTZ will not offer services which compete with existing FTZs is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Finally, the *Remand Determination* notes the support of state and local officials for additional zone services as a basis for the Board's determination that the convenience of commerce would be served by the creation of an additional FTZ in the Miami Customs port of entry. The *Remand Determination* notes comments in the Examiner's Report that "any incidental competitive effects for the FTZ 32 operator are outweighed by the significant public benefits resulting from assisting the economic development of the Wynwood area, which state and local officials have indicated, through their programs and assistance such as the state enterprise zone, is in the public interest." *(Remand Determination* at 7–8 (quoting P.R. 105 at 10).)

In *Miami Free Zone I,* this Court made an effort to distinguish "public interest" factors from "convenience of commerce" analysis. The Court noted that "[w]hile 'public interest' considerations may play a role in a 'convenience of commerce' analysis, the terms are not necessarily synonymous. 'Public interest' is a broader term, and hence public interest considerations may include factors largely unrelated to the 'convenience of commerce.'" *Miami Free Zone I,* 914 F. Supp. at 629. The Court observes under the facts of this case, while the support for the application by state and local officials may serve as some evidence of commercial convenience, it is clear that such support standing alone would not constitute sufficient evidence to uphold the Board's grant. The first three factors raised by the Board in support of its grant to Wynwood, however, provide a sufficient basis for this Court to uphold the Board's determination that "the existing zones would 'not adequately serve the convenience of commerce' and the conclusion that 'there is adequate evidence of the need for the additional zone project to serve the convenience of commerce in the Miami Customs Port of Entry area.'" (Remand Determination at 1–2 (quoting P.R. 105 at 10–11).)

CONCLUSION

This Court finds the Foreign-Trade Zones Board acted within the scope of its authority in granting an additional general-purpose foreign-trade zone within the Miami Customs port of entry, based on its determination that the existing foreign-trade zones operating within the Miami Customs port of entry are inadequate to serve the convenience of commerce. The Court sustains the Board's grant authorizing the creation of a foreign-trade zone in Wynwood, Florida finding it is supported by substantial record evidence and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(Slip Op. 96–181)

SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND UNITED ELECTRICAL WORKERS OF AMERICA, INDEPENDENT, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO, DEFENDANT-INTERVENORS

Consolidated Court No. 96–03–00685

(Dated November 7, 1996)

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Warren E. Connelly and *Katherine M. Ho)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Mark A. Barnett,* Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC (Paul D. Cullen, Jeffrey S. Beckington and *Mary T. Staley)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This case is before the court on plaintiffs Samsung Electronics Co., Ltd.'s and Samsung Electronics America, Inc.'s (collectively "Samsung") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Samsung contests the United States Department of Commerce's ("Commerce") rejection of Samsung's untimely requests for revocation of the antidumping order against color television receivers ("CTVs") from Korea.

BACKGROUND

A request for revocation of antidumping duties requires, *inter alia,* three annual reviews resulting in zero or *de minimis* dumping margins. 19 C.F.R. § 353.25(a)(2). The first administrative review of Samsung's import sales resulted in a finding of more than *de minimis* margins.[1] *Color Television Receivers from Korea,* 49 Fed. Reg. 50,420, 50,431 (Dep't Comm. 1984)(final results of admin. rev.). In the fourth and fifth administrative reviews, Commerce found for the first time *de minimis* dumping margins.[2] *Color Television Receivers from the Republic of Korea,* 56 Fed. Reg. 12,701, 12,711 (Dep't Comm. 1991)(final results of admin. rev.); *Color Television Receivers from the Republic of Korea,* 55 Fed. Reg. 26,225, 26,237 (Dep't Comm. 1990)(final results of admin. rev.).

Following the two administrative reviews finding *de minimis* dumping margins, the sixth administrative review had the potential to fulfill

[1] The first administrative review of CTVs from Korea covered the period October 19, 1983 through April 30, 1984. Subsequent reviews occurred on a yearly basis.

[2] The proceedings in these cases were stayed pending the conclusion of litigation with respect to the final results of the first administrative review. The court affirmed Commerce's remand results, which resulted in *de minimis* margins for Samsung. *Zenith Elects. Corp. v. United States,* Slip Op. 95–100, at 1 (CIT May 31, 1995).

the three year requirement for a revocation request. As the antidumping duty order of CTVs from Korea was published in April of 1984, April 1989 was the opportunity month in which Samsung could request an administrative review for the sixth review period. Samsung did not request that Commerce consider revocation of the antidumping duty order at that time.

In May 1989, Commerce published a notice of initiation of the sixth administrative review. *Color Television Receivers from the Republic of Korea,* 54 Fed. Reg. 22,465, 22,465 (Dep't Comm. 1989) (initiation of antidumping and countervailing duty admin. revs.). Samsung filed a request for partial revocation of the Korean CTV antidumping order on November 12, 1993, three and one half years after initiation of the review and two and one half years after verification in the sixth review.

With respect to the seventh review period, Commerce published a notice of initiation of the administrative review on June 1, 1990. *Color Television Receivers from the Republic of Korea,* 55 Fed. Reg. 22,366, 22,366 (Dep't Comm. 1990) (initiation of antidumping and countervailing duty admin. revs.).[3] Samsung did not request revocation during the anniversary month of April 1990. Instead, Samsung requested revocation of the Korean CTVs antidumping duty order on its merchandise on November 3, 1993, two and one half years after initiation of the seventh review.

In February 1995, Commerce published the preliminary results of the sixth and seventh reviews and found *de minimis* margins. *Color Television Receivers from the Republic of Korea,* 60 Fed. Reg. 9005, 9008 (Dep't Comm. 1995)(prelim. results). In February 1996, Commerce published the final results of both reviews which included a finding of *de minimis* margins. *Color Television Receivers from the Republic of Korea,* 61 Fed. Reg. 4408, 4415 (Dep't Comm. 1996) (final results of admin. rev.) [hereinafter *"Sixth and Seventh Administrative Reviews"].* In both the preliminary and final results, Commerce did not consider Samsung's untimely requests for revocation.

On June 24, 1996, Commerce initiated a review pursuant to 19 C.F.R. § 353.22(f) to determine whether changed circumstances exist sufficient to warrant revocation of the antidumping order as to Samsung. *Color Television Receivers from the Republic of Korea,* 61 Fed. Reg. 32,426, 32,427 (Dep't Comm. 1996)(initiation of changed circumstances rev.). In the notice of initiation, Commerce indicated that a changed circumstances review was warranted based upon "the combination of the timing of certain court decisions, the timing of certain results of administrative review in this proceeding, and the coincidence of these events with the company's decision to stop shipping from Korea * * *." *Id.*

On January 19, 1996, Commerce initiated an anti-circumvention inquiry to determine whether Samsung is circumventing the antidump-

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[3] Samsung acknowledges that the factual and legal basis for its claim regarding the seventh review are essentially the same as for the sixth review. Samsung Mem. at 3, n.2. There does not appear to be any basis for a different result for the seventh administrative review than for the sixth administrative review. Consequently, the court does not discuss separately the seventh administrative review.

ing order by completing or assembling CTVs in Mexico and Thailand for exportation to the United States. Commerce is conducting this review concurrent with the changed circumstances review. *Id.* A final determination has not yet been issued in either proceeding, but is expected in June 1997.

STANDARD OF REVIEW

The standard of review for an agency's determination requires the court hold any determination unlawful if unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i)(1994); *Koyo Seiko Co. v. United States,* 17 CIT 474, 475, 840 F. Supp. 136, 138 (1993), *aff'd,* 20 F.3d 1156, 1157 (1994).

DISCUSSION

The basic requirements for revocation of an antidumping duty order are set forth in 19 C.F.R. § 353.25(a)(2), which provides that Commerce may revoke an order, in part, if: (1) a producer sold the merchandise in issue at not less than foreign market value ("FMV") for at least three consecutive years, (2) it is not likely that the producer will in the future sell the merchandise at less than FMV, and (3) the producer agrees to the immediate reinstatement of the antidumping order if it is found to sell at less than FMV. 19 C.F.R. § 353.25(a)(2)(1996). The request must contain a certification that the producer has sold at not less than FMV during the period under review and that in the future, the manufacturer will not sell at less than FMV. 19 C.F.R. §§ 353.22(b), 353.25(b)(1).

The request must be submitted during the third annual anniversary month of the publication of an order, or during any subsequent anniversary months (e.g., fourth, fifth, etc.) if it is to be considered in the review requested that month. Commerce has interpreted this time limitation to be a mandatory, bright line requirement, *see Certain Fresh Cut Flowers from Columbia,* 56 Fed. Reg. 50,554, 50,557 (Dep't Comm. 1991)(final results admin. rev.), an interpretation upheld by the Court of International Trade. *See Exportaciones Bochica/Floral v. United States,* 16 CIT 670, 671, 802 F. Supp. 447, 448 (1992), *aff'd without opinion,* 996 F.2d 317 (Fed. Cir. 1993)[hereinafter *"Bochica/Floral"].*

Samsung did not submit its request for revocation during April 1989, the first anniversary month of the antidumping order following its third year of *de minimis* dumping margins, or during any subsequent anniversary month, as required by 19 C.F.R. § 353.25(b). Instead, in 1993 and 1994 Samsung submitted requests for revocation in November, which is not an anniversary month. Plaintiff concedes that its requests were untimely, but nevertheless asks that the court require Commerce to waive the time limitation set forth in the regulations and review their revocation requests.

Plaintiff essentially advances two arguments in support of its claim. First, plaintiff argues that Commerce had discretion under the regulation to waive the mandatory time requirements of 19 C.F.R. § 353.25, and that Commerce should do so in this case. Second, plaintiff argues

that Commerce's prolonged delay in issuing the final results for the administrative reviews, coupled with the uncertainty resulting from the decision in *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 712 F. Supp. 931 (1989), *rev'd, Daewoo Elec. Co. v. Int'l Union of Electronic, Technical, Salaried and Machine Workers,* 6 F.3d 1511 (Fed. Cir. 1993), effectively prevented Samsung from timely filing the required certification for revocation.

To support its first argument, Samsung relies on two cases interpreting Commerce's discretion to waive the mandatory time requirements set forth in 19 C.F.R. § 353.31(a), which prescribes time limitations for submission of factual information: *CEMEX, S.A. v. United States,* Slip Op. 95–72, at 23 (CIT Apr. 24, 1995); and *Böwe-Passat v. United States,* 17 CIT 335, 338–39 (1993). Neither *CEMEX* nor *Böwe-Passat* addressed 19 C.F.R. § 353.25, the regulation in issue here.

The court in *Böwe-Passat* ordered Commerce to accept the plaintiff's untimely filed factual submission into the administrative record. *Böwe-Passat,* 17 CIT at 343. The court carefully circumscribed the holding by emphasizing that it is "based on and limited to the specific circumstances of this case."[4] *Id.* The narrow holding of *Böwe-Passat* significantly undermines Samsung's reliance on it for an interpretation of a *different regulation,* in a case with markedly different facts.

As for *CEMEX,* in writing about 19 C.F.R. § 353.31(a) *(not § 353.25),* the court noted that although "the language of Commerce's regulation is mandatory, Commerce routinely accepts data after deadlines depending on the circumstances of each case." *CEMEX,* Slip Op. 95–72, at 23. In *CEMEX,* however, the court did not directly order Commerce to supplement the administrative record with untimely submissions. *Id.* at 24. Instead, the court agreed that certain information was "new" factual information that was properly excluded, and remanded to Commerce to consider whether it properly excluded other information. *Id.* Here again, Samsung's reliance on a few carefully selected phrases from the *CEMEX* decision is undermined by the actual holding of the case.

Plaintiff urges the court to read *CEMEX* and *Böwe-Passat* expansively, interpreting the time limitation set forth in 19 C.F.R. § 353.25 as a discretionary guideline that Commerce is free to waive. While one might apply, by analogy, the rationale of both cases to 19 C.F.R. § 353.25, the court declines to do so. The burden placed on Commerce by the submission of factual information after a deadline is relatively light compared to the administrative burden imposed on Commerce by an untimely request for revocation. In response to a request for revocation, Commerce must initiate and conduct an entire investigation. *See* 19 C.F.R. § 353.25(c); *Sixth and Seventh Administrative Reviews,* 61 Fed. Reg. at

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[4] The court limited the holding of *Böwe-Passat* to the specific facts of that case. There, the plaintiff responded to Commerce's deficiency letter in good faith. *Böwe-Passat,* 17 CIT at 339. However, Commerce did not indicate how Böwe-Passat's original response was insufficient and subsequently refused to accept untimely filed supplemental information. *Id.* The court found that Böwe-Passat could not have complied with Commerce's demands without clarification by Commerce of what information was required. *Id.* Thus, the court required Commerce to exercise its discretion to accept the supplemental information. *Id.* at 343.

4414–15. If the plaintiff could command Commerce to conduct such an investigation at its whim rather than only once per year, Commerce's administrative efficiency would be adversely affected. *Bochica/Floral,* 16 CIT at 671, 802 F. Supp. at 448.

A more significant distinction is that in contrast to its application of 19 C.F.R. § 353.31, Commerce has not routinely accepted revocation requests under 19 C.F.R. § 353.25 after the regulatory deadline.[5] Instead, the CIT has upheld Commerce's interpretation of 19 C.F.R. § 353.25(b) as a mandatory, bright line rule requiring that a producer must submit its revocation request during the anniversary month of an antidumping duty order.[6] *Bochica/Floral,* 16 CIT at 671, 802 F. Supp. at 448.

In *Certain Fresh Cut Flowers from Columbia,* 56 Fed. Reg. at 50,557, Commerce refused to consider a request for revocation received from Exportaciones Bochica/Floral, a Columbian flower producer, that was made after the anniversary month of the antidumping duty order. The CIT upheld this application of the regulation in *Bochica/Floral,* 16 CIT at 671, 802 F. Supp. at 448. The court cited the ITA's administrative burdens and the need for prompt completion of reviews as support for its conclusion that the mandatory requirement of filing on an anniversary month was a reasonable interpretation of the regulation deserving judicial deference. *Id.*

Samsung's second argument focuses on whether in April 1989 it could have filed a good faith certification accompanying its request for revocation. A certification requires the plaintiff reasonably believe that it has met the requirements for revocation.[7] *Sixth and Seventh Administrative Reviews,* 61 Fed. Reg. at 4414. Based on two facts, Samsung contends that if it had filed a request for revocation, it would have been based on mere speculation and not a reasonable belief. First, Commerce did not publish the results of the fourth and fifth administrative reviews until 1990 and 1991 respectively, well after the April 1989 anniversary month. Second, *Daewoo Elecs.* delayed the results of the sixth adminis-

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[5] The administrative determination in *Elemental Sulphur From Canada,* 56 Fed. Reg. 5391, 5391 (Dep't Comm. 1991) (final results of admin. rev.) [hereinafter *"Elemental Sulphur"*], does not support the view that 19 C.F.R. § 353.25 is not a bright line test. Unlike Samsung, in *Elemental Sulphur,* the respondent filed a request for revocation during the anniversary month of the order. *Id.* The fact that the respondent in *Elemental Sulphur* filed the request a year after the third consecutive review with *de minimis* dumping margins may be support for interpreting the regulation to allow filing in an anniversary month even if there is a gap between the consecutive years of selling at fair market value and the revocation request. Of course, even if the regulation does not provide a bright line requirement as to the year of filing, it still provides a bright line test as to the month of filing and Commerce also would retain discretion to discount stale information. Because of Samsung's failure to file in any anniversary month we need not resolve the potential conflict between *Elemental Sulphur* and Commerce's current view that any gap between the last consecutive year of fair trading and the request precludes granting of the revocation request.

[6] Plaintiff also relies upon *Carton Closing Staples and Stapling Machines from Sweden,* 57 Fed. Reg. 4596, 4596 (Dep't Comm. 1992) (determ. not to revoke)[hereinafter *"Carton Closing"*], to support the proposition that Commerce has the discretion to waive the mandatory requirements of 19 C.F.R. § 353.25. In *Carton Closing,* Commerce accepted an untimely objection to the agency's intent to revoke an antidumping order because Commerce failed to meet its own deadline for publishing notice of its intent to revoke. *Id.* This case is distinguishable from Samsung's case because in *Carton Closing* Commerce's conduct violated the explicit language of 19 C.F.R. § 353.25(d)(4)(i), a sunset provision requiring Commerce publish a notice of intent by a specific day. Here, however, not only is Commerce acting under a different provision of the regulations, its own conduct did not violate the explicit language of 19 C.F.R. § 353.25.

[7] There is some question as to whether the certification requirement in the regulation refers to the one year period preceding the request or the three year consecutive period referred to in 19 C.F.R. § 353.25(a). *Compare* 19 C.F.R. § 353.25(a),(b) and 19 C.F.R. § 353.22(b). As a practical matter, three years of no dumping are required; thus, a circumscribed certification would not be particularly useful. *See also supra* note 5.

trative review until 1995, six years after the period under review, by potentially altering Commerce's method of calculating antidumping duties. *See Daewoo Elecs.*, 13 CIT at 278–82, 712 F. Supp. at 954–56. Thus, Samsung contends that in April 1989, it did not have the necessary data to reasonably believe that it had *de minimis* dumping margins for the fourth, fifth and sixth review periods.

Samsung's ignorance of the outcome of the fourth and fifth administrative reviews did not prevent it from filing a certification in April 1989. As Commerce articulated in its final results for the sixth and seventh administrative reviews, the certification

> is always made in advance of conducting the review, [therefore,] it reflects the respondent's best information and belief concerning its pricing behavior during the period. Although the Department had not issued preliminary results of review for periods four and five by the time the revocation request was required for period six in April of 1989, no presumption existed that Samsung had been dumping those earlier periods * * *. Even though Samsung could not know at the time whether it would ultimately qualify for revocation, it had a sufficient basis to make the request and could have timely done so.

Sixth and Seventh Administrative Reviews, 61 Fed. Reg. at 4414. In short, Samsung could have preserved its rights by filing the request for revocation in April 1989, with whatever qualifying statements were necessary.

Finally, even if the court were convinced that Commerce's interpretation of the regulation of the statute was unreasonable, and that it was within Commerce's discretion to waive the April filing requirement, the court must carefully consider whether such discretion was abused and whether the court should intervene at this stage. The plaintiff has been subject to *de minimis* margins for the 4th, 5th, 6th, and 7th review periods, after which it ceased exporting to the United States. Commerce has initiated both anticircumvention and changed circumstances reviews which will address whether the antidumping duty order should be revoked as to Samsung. Commerce, therefore, is presently considering revocation of the antidumping duty order, the very relief Samsung seeks in the present case, albeit somewhat later than it would have preferred. It would be unreasonable to order revocation remand results earlier than the completion of the related anticircumvention and changed circumstances reviews. Thus, little would be gained by the court's action.

In any case, the court denies Samsung's motion for judgment on the agency record as Samsung failed to file its request for revocation during the anniversary month of the antidumping duty order.

PUBLIC VERSION

(Slip Op. 96–182)

THAI PINEAPPLE PUBLIC CO., LTD., ET AL., PLAINTIFFS, AND DOLE FOOD CO., INC., ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, ET AL., DEFENDANTS, AND MAUI PINEAPPLE CO. LTD., DEFENDANT-INTERVENOR

Consolidated Court No. 95–08–01064

[ITA determination remanded.]

(Dated November 8, 1996)

Willkie, Farr & Gallagher (Kenneth J. Pierce, William B. Lindsey and *Robert L. La Frankie)* for plaintiffs.

Patton Boggs, L.L.P. (Michael D. Esch and *John F. Cobau)* for plaintiff-intervenors.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Matthew Bode), Stacy J. Ettinger,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendants.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal Lynn E. Duffy and *Laura A. Svat)* for defendant-intervenor.

OPINION*

RESTANI, *Judge:* This matter is before the court on a motion for judgment on the agency record by plaintiffs, The Thai Pineapple Public Co., Ltd. ("TIPCO"), Malee Sampran Factory Public Co., Ltd. ("Malee"), and Siam Agro Industry Pineapple and Others Public Co., Ltd. ("SAICO"), (collectively the "Thai plaintiffs"), and Siam Food Products Public Co., Ltd. ("Siam Food"); by plaintiff-intervenors, Dole Food Company, Inc., Dole Packaged Foods Co., and Dole Thailand, Ltd., (collectively "Dole"); and by defendant-intervenor, Maui Pineapple Co., Ltd. ("Maui") pursuant to USCIT Rule 56.2. The administrative determination under review is the final antidumping duty determination of the United States Department of Commerce ("Commerce") entitled *Canned Pineapple Fruit ["CPF"] From Thailand,* 60 Fed. Reg. 29,553 (Dep't Comm. 1995) (final determ. of LTFV sales) [hereinafter *"Final Det."], as amended,* 60 Fed. Reg. 36,775 (Dep't Comm. 1995).

The Thai plaintiffs contend that Commerce erred in using their normal accounting systems for allocation of raw material fruit costs for purposes of calculating cost of production ("COP") and constructed value ("CV") and in rejecting their weight-based allocation methodologies. Dole also claims that Commerce unlawfully rejected Dole's weight-based fruit cost allocation and, in addition, improperly substituted best information available ("BIA"), used arbitrary weighting factors in calculating the weight averaged dumping margins, improperly calculated Dole's indirect expenses, and failed to fully adjust for all expense differences. Maui argues that Commerce's decision to treat Dole's sale to Ger-

* Footnote 6 contains bracketed confidential information which is to be deleted from publicly distributed copies.

many as outside the ordinary course of trade is contrary to law and unsupported by substantial evidence.

In response, Commerce argues that all of its contested determinations were reasonable, supported by substantial evidence, and otherwise in accordance with law. Commerce does, however, request that the court remand this matter to Commerce so that it may use the same time period for weighting the dumping margin for all Dole products and for Commerce to instruct the United States Customs Service ("Customs") to assess antidumping duties only upon Dole CPF from Thailand that was entered, or withdrawn from warehouse for consumption on or after February 22, 1995, the date of publication of the amended preliminary less than fair value ("LTFV") determination relating to CPF from Thailand. Commerce's latter request for a remand is not opposed and is granted.

BACKGROUND

On June 8, 1994, Maui and others petitioned Commerce and the United States International Trade Commission ("ITC"), alleging that the CPF from Thailand was being sold at LTFV. Based upon the petition, Commerce initiated an antidumping investigation. *Canned Pineapple Fruit From Thailand,* 59 Fed. Reg. 34,408 (Dep't Comm. 1994) (initiation of investigation).

On January 11, 1995, Commerce found preliminary dumping margins for Malee, TIPCO, and SAICO ranging from 1.12 to 9.55 percent. *Canned Pineapple Fruit From Thailand,* 60 Fed. Reg. 2734, 2738 (Dep't Comm. 1995) (prelim. determ.) [hereinafter *"Prelim. Det."].* Commerce found a *de minimis* dumping margin for Dole of .30 percent. *Id.* On February 22, 1995, Commerce revised the preliminary dumping margin for Dole from .30 to .78 percent because Commerce found a significant ministerial error in its preliminary calculation. *Canned Pineapple Fruit From Thailand,* 60 Fed. Reg. 9820 (Dep't Comm. 1995) (amended prelim. determ.).

In February and March 1995, Commerce conducted verification and in June 1995, Commerce issued its final determination finding dumping margins for Dole, TIPCO, Malee, and SAICO ranging from 2.36 to 55.77 percent. *Final Det.,* 60 Fed. Reg. at 29,571. On July 10, 1995, the ITC notified Commerce of its final affirmative injury determination, and on July 18, 1995, Commerce published an amended final determination and the antidumping duty order. *Canned Pineapple Fruit From Thailand,* 60 Fed. Reg. 36,775 (Dep't Comm. 1995) (amended final determ. and order) [hereinafter *"Amended Final Det."].* The revised final dumping margins for Dole, TIPCO, Malee, and SAICO, after correction of ministerial errors in the final determination, range from 1.73 to 51.16 percent. *Id.* at 36,776.

STANDARD OF REVIEW

The court must sustain a final determination of Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988).[1]

DISCUSSION

I. *Dole's German Sale:*

In its preliminary margin calculations for Dole, Commerce matched all United States sales of two products *(i.e.,* CONNUMUs 1211 and 1231)[2] to a single sale of a "similar" German product[3] *(i.e.,* CONNUMT 1142). Final Concurrence Memorandum at 11 [hereinafter *"Final Concur. Mem."];* C.R. Doc. 154; Defs.' Conf. App., Ex. 10. The United States sales of the two products together accounted for about one percent by volume of Dole's total United States database during the POI; the single German sale of the one product accounted for less than 0.01 percent by volume of Dole's total German database during the POI. *Id.* This accounted for over 90 percent of Dole's dumping margin. *Id.* Dole objected and argued that the single German sale was outside the ordinary course of trade. Commerce agreed with Dole and excluded the sale from the calculation of FMV. *Final Det.,* 60 Fed. Reg. at 29,562–63.

Commerce calculates FMV by following the general method prescribed by 19 U.S.C. § 1677b(a)(1)(A) (1988):

> The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person * * *
>
> (A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and *in the ordinary course of trade* for home consumption * * *.

Id. § 1677b(a)(1)(A) (emphasis added). Under the statute,

> [t]he term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is the subject of the investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

Id. § 1677(15) (1988). In determining whether a sale is outside the ordinary course of trade, Commerce must consider "all the circumstances particular to the sales in question." *CEMEX, S.A. v. United States,* Slip Op. 95–72, at 6 (Apr. 24, 1995) (quotations omitted); *see also Final Det.,*

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[1] The applicable statutory and regulatory provisions in this case are those provisions as they existed on December 31, 1994, *i.e.,* prior to the amendments made under the Uruguay Round Agreements Act.

[2] "CONNUM" is the computer field name assigned to each unique product sold. "CONNUMU" indicates a United States product and "CONNUMT" indicates a third country product.

[3] In calculating the dumping margins, Commerce relied upon sales to Germany as the basis for foreign market value ("FMV") because it determined that none of the four respondents had a viable home market. *Prelim. Det.,* 60 Fed. Reg. at 2737; *Final Det.,* 60 Fed. Reg. at 29,554.

60 Fed. Reg. at 29,563. Furthermore, "Commerce, in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made with in the ordinary course of trade." *Laclede Steel Co. v. United States,* Slip Op. 95–144, at 6 (Aug. 11, 1995). Commerce's "analysis of these factors [is] guided by the purpose of the ordinary course of trade provision, namely, 'to prevent dumping margins from being based on sales which are not representative' of the home [or third country] market." *CEMEX, S.A.,* Slip Op. 95–72, at 6 (quoting *Monsanto Co. v. United States,* 12 CIT 937, 940, 698 F. Supp. 275, 278 (1988)).

Maui contends that Commerce's analysis failed to satisfy the legal standard for treating Dole's German sale as outside the ordinary course of trade. Maui argues that Commerce failed to consider the totality of the circumstances surrounding the sale, as required by the statute, and ignored overwhelming record evidence demonstrating that the sale was not unrepresentative when assessed against other sales in Dole's third-country sales database, including those prior to the POI. Maui argues that Commerce's decision was based upon only three factors: volume, price, and demand, which alone are insufficient grounds for finding the sale was outside the ordinary course of trade, and that Commerce erred in failing to consider other factors *(e.g.,* merchandise standards; use of the merchandise; whether the sale was promotional or a trial sale; or whether the price of the sale was specially negotiated). Finally, Maui claims that Commerce wrongly considered only gross unit prices rather than net prices and relied on unverified data.

The court finds that Commerce's decision to exclude Dole's German sale was reasonable and supported by substantial evidence. In making its final determination, Commerce evaluated eight factors: customers, terms of sale, volume of sales, frequency of sales, sales quantity, sales price, profitability, and market demand. *Final Concur. Mem.* at 13–14; *see also Final Det.,* 60 Fed. Reg. at 29,563. Commerce found that of the eight factors, only the first two did not support a finding that the sale was outside the ordinary course of trade and agreed with petitioners that the customer and terms of sale were not unique. *Final Concur. Mem.* at 13.

Commerce concluded that the other six factors, however, supported a finding that the sale *was* outside the ordinary course of trade. *Id.* at 13–14; *see also Final Det.,* 60 Fed. Reg. at 29,563. In particular, Commerce found that:

> (1) Dole's single third country sale of this product constituted an insignificant portion of its total German sale volume; (2) the sale was of a product that was sold only once during the POI; (3) the sales quantity was significantly lower than the average sales quantity for the POI; (4) the sales price was significantly higher than the average sales price charged on other CPF products sold in the same can size during the POI; (5) the profit margin realized by Dole on this particular sale was substantially higher than the weighted-average profit earned on other sales of CPF in this can size during the

POI; and (6) there was only one customer for this product in the third country market during the POI.

Final Det., 60 Fed. Reg. at 29,563; *see also Final Concur. Mem.* at 13–14.

Commerce properly weighed the contrary factors against the six other factors that were in favor of an outside of the ordinary course finding. These six factors have been found previously to be significant in ordinary course of trade analyses. *See Laclede Steel Co.*, Slip Op. 95–144, at 9–11 (court sustained Commerce's ordinary course of trade decision based upon consideration of sales price, profitability, market demand, terms of sale, sales quantity, sales volume, industry specifications, and special marking of merchandise); *see also CEMEX, S.A.*, Slip Op. 95–72, at 6–14 (court sustained Commerce decision based upon consideration of market demand, sales volume, sales patterns, shipping arrangements, profitability, and corporate image). Moreover, "ordinary course of trade is determined on a case-by-case basis by examining all of the relevant facts and circumstances." *CEMEX, S.A.*, Slip Op. 95–72, at 13.

Maui presents no convincing argument as to why the data relied on by Commerce was insufficient to allow Commerce to assess whether the circumstances surrounding the sale was truly aberrant, other than stating the record contains no evidence that demonstrates that the sale was a "trial sale" or affirmatively establishes the sale as non-representative outside the confines of the POI. The court finds that Commerce sufficiently examined the totality of the circumstances surrounding the German sale by analyzing the six month POI. Commerce determinations, whether in an investigation or an administrative review, are based upon record evidence for that particular segment of the proceeding.

Maui further argues that Commerce should have considered net unit price instead of gross unit price as it is agency practice to rely on net unit prices to make "apples to apples" comparisons between transactions regardless of individual sales terms. In terms of net unit prices, Maui claims that the net price of the sale is not markedly different from that of the next most similar merchandise. *See* Maui's Mot. For Summary J. on the Agency R. at 21 & Ex. 1. If Commerce had relied on net prices, Maui contends that the sale in question stood less than 30 percent higher than the next most similar merchandise as compared to the more than 80 percent difference in gross prices relied upon by Commerce. *Id.* at 21. Maui also contends that Commerce's reliance on gross unit prices distorted the profitability of the German sale.

Commerce, however, was making a judgment about the data, not performing a full margin calculation analysis and thus, an examination of net unit price was unnecessary where Commerce considered comparison of gross unit prices sufficient. Commerce is was not required to perform a cost test analysis upon the particular sale in order to analyze the profit of this sale relative to the weighted-average profit earned upon other sales of CPF in the same can size.

Finally, Maui argues that the sale at issue was not anomalous in terms of sales quantity because there were two other sales of relatively small quantity and although the sale was to only one customer, other products were also sold to only one customer. The court finds, however, that Commerce correctly analyzed the sale quantity of the German sale relative to the average sales quantity of the remaining sales. It was less than one percent of the normal quantities. Despite the fact that the other sales were made to only one customer, Commerce may still determine that this factor was significant in its overall analysis.

"[P]laintiffs have the burden of demonstrating the sales Commerce excluded from its [FMV] calculation were *not* outside the ordinary course of trade." *Timken Co. v. United States,* 18 CIT 486, 492, 852 F. Supp. 1122, 1128 (1994) (emphasis in original). Maui has not met this burden. Accordingly, the court finds that Commerce's decision to exclude Dole's German sale from the FMV calculation was supported by substantial evidence and in accordance with law.

II. *Fruit Cost Allocation Methodologies:*

Commerce must compute a CV in lieu of FMV if significant sales are below cost of production. 19 U.S.C. § 1677b. The statute provides a formula for calculating CV:

> [T]he constructed value of imported merchandise shall be the sum of—
>
> (A) the cost of materials (exclusive of any internal tax * * *) and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *
>
> (B) an amount for general expenses and profit * * *
>
> (C) the cost of all containers and coverings of whatever nature * * *.

Id. § 1677b(e)(1). Constructed value is thus, defined as, "the combined cost of materials, fabrication or other processing of any kind, general expenses and profit, and other incidental shipping expenses." *IPSCO, Inc. v. United States,* 965 F.2d 1056, 1059 (Fed. Cir. 1992) [hereinafter *"IPSCO III"].* "The cost of materials encompasses the cost of raw components in the manufacturing process." *Id.* Thus, cost accounting was relevant to both Commerce's COP and CV decisions.

In addition to producing CPF,[4] Dole, TIPCO, SAICO, and Malee produce additional pineapple products, such as pineapple juice and juice concentrate, which are not covered by the scope of the investigation. These products are made from the same raw material, fresh pineapple fruit and thus, share jointly the cost of this material. No method for segregating parts of the product and costing them separately has been proposed.[5]

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[4] CPF is defined as "pineapple processed and/or prepared into various product forms, including rings, pieces, chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added." *Final Det.,* 60 Fed. Reg. at 29,553.

[5] No party argued that juice is a byproduct, such as pineapple waste. Thus, all parties agree that a co-product methodology for allocation of joint costs is necessary.

In the proceeding below, each of the Thai plaintiffs claimed that their normal methodology for allocating the cost of fresh pineapple fruit between CPF and non-CPF co-products resulted in distorted and inappropriate cost of production figures. As a result, Dole, TIPCO, SAICO, and Malee each reported raw material fruit costs using an alternative allocation methodology based upon the output derived weight of the fresh fruit used in the various pineapple-containing products. This methodology resulted in a significantly lower fruit cost allocation to CPF and hence, a lower COP and CV. *See Final Concur. Mem.* at 23.

In its final determination, Commerce rejected the Thai plaintiffs' alternative weight-based allocation methodology and instead, relied upon the pineapple fruit cost allocations as calculated pursuant to each company's normal accounting system, with the exception of Dole, because Commerce found that each Thai company's allocation methodology was consistent with Thai generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with production of CPF. *See Final Det.*, 60 Fed. Reg. at 29,559–62. For Dole, Commerce relied upon an average of the fruit cost allocation percentages used by TIPCO, SAICO, and Malee because, although Dole's allocation methodology was consistent with Thai GAAP, Commerce found that it did not reasonably reflect the costs associated with production of CPF. *Id.* at 29,560. Juice costs were admittedly understated.

TIPCO, SAICO, and Malee claim that their normal formulas make no attempt to measure costs accurately and in fact, grossly overallocate costs to CPF. The Thai plaintiffs argue that Commerce ignored the record evidence to this effect, which makes it clear that the allocation bears no resemblance to either a weight or value-based allocation, and Commerce's use of the Thai plaintiff's normal allocation formulas was not supported by substantial evidence. Furthermore, the Thai plaintiffs assert that by utilizing accounting methodologies that distort costs, Commerce's decision violated the statutory requirement that COP and CV be based on actual costs and thus, was not in accordance with law. *See IPSCO III*, 965 F.2d 1056 (requiring weight-based allocation of costs among joint pipe products).

The legislative history of the antidumping statute states that "in determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." H.R. Rep. No. 93–571, at 71 (1973). Commerce asserts that its normal practice is to adhere to an individual firm's recording of costs in accordance with the GAAP of its home country if Commerce is satisfied that such principles reasonably reflect the costs of producing the subject merchandise. *Final Det.*, 60 Fed. Reg. at 29,559. Commerce maintains that the rationale behind this practice is that normal accounting practices should, in most circumstances, provide an objective standard by which to measure costs, while allowing the

respondents a predictable basis on which to compute those costs. *Id.* In those instances in which Commerce determines that a company's normal accounting practices result in an unreasonable allocation of production costs, however, it will make certain adjustments or use alternative methodologies that more accurately capture the costs incurred. *Id.*

It is not disputed that TIPCO, SAICO, and Malee's normal fruit cost allocation methodologies were consistent with Thai GAAP. TIPCO, SAICO, and Malee argued, however, that their normal allocation methodologies do not reasonably reflect costs, because the methodologies were designed to achieve certain managerial goals as opposed to providing accurate cost information.[6] *Id.* Commerce, however, found that while these reasons may have been factors in the companies' selection of the methodologies, this does not make the methodologies, or their resulting allocations, unreasonable, particularly where a company's accounting methodology had been approved by independent auditors. *Id.* at 29,560.

To support this position, Commerce cites *Hercules, Inc. v. United States,* 11 CIT 710, 673 F. Supp. 454 (1987). In *Hercules,* the court upheld Commerce's decision to rely upon COP information from respondent's normal financial statements maintained in conformity with GAAP. 11 CIT at 755, 673 F. Supp. at 490. The respondent, SNPE, had argued that the accelerated depreciation method employed in its financial statements and records was for tax purposes and did not accurately reflect SNPE'S actual costs. *Id.* Consequently, SNPE submitted recalculated depreciation expenses under a straight-line methodology. Commerce rejected this alternate allocation methodology, which was based upon unverifiable allegations that straight-line depreciation methodology would more accurately reflect actual costs, in favor of the information contained in SNPE's verified normal records and audited financial statements. 11 CIT at 755–56, 673 F. Supp. at 490–91. Commerce claims that in the present case, as in *Hercules,* Commerce chose to rely on verified and independently audited normal allocation methodologies, rather than the respondents' unverified alternative methodologies. *Final Det.,* 60 Fed. Reg. 29,560.

Here, however, plaintiffs have demonstrated that the allocation formulas are unrelated to actual cost. The allocation formulas used in the normal course of business do not vary regardless of changes in raw fruit prices, finished goods prices, input materials' utilization efficiencies, or relative production output. *See* Hearing Transcript at 34. Only Malee allocates according to some notion of either cost or value. It allocates more than 80 percent of fruit costs to solid products and less than 20 percent to juice products. *See* Malee Sec. D Resp. at 28 (Dec. 23, 1994); C.R. Doc. 56; Pls.' Conf. App., Ex. 12; *see also* Cost Verification Report for Malee (Apr. 6, 1995) at 6; C.R. Doc. 118; Pls.' Conf. App., Ex. 13.[7] The cost verification exhibits show that this formula is based on rough esti-

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[6] [ ]

[7] SAICO and TIPCO's normal allocations were approximately midway between Malee's and Dole's.

mates, averages, and standard numbers, rather than actual cost or sales records, and like the TIPCO and SAICO approaches it takes no account of fluctuations in relevant costs or prices. *See* Malee Sec. D Resp. at 28.

Commerce explicitly recognized the lack of a factual basis in SAICO's case. Commerce stated that:

> In SAICO's normal accounting system, pineapple fruit costs are allocated on a basis which is purely nominal and has no basis in fact.

Cost Verification Report for SAICO at 17 (Apr. 4, 1995); C.R. Doc. 111; Pls.' Conf. App., Ex. 7.

The Thai plaintiffs also argue that although they have utilized these allocation formulas for several years, this fact does not make the allocation formulas any less distortive of actual costs for the purposes of antidumping law. *See Final Det.*, 60 Fed. Reg. at 29,559 (Commerce "found that each company had used its recorded fruit cost allocation methodology for at least a number of years").

The Thai plaintiffs argue further that Commerce acted inconsistently when it deviated from the Thai plaintiffs' normal accounting practices on several occasions in calculating COP and CV in the underlying investigation without factually distinguishing why it was appropriate in those occasions but not for fruit costs. Commerce admits that in certain instances (fruit receiving and common processing costs, sugar costs, plantation overhead costs, and direct labor costs) do represent departures from the Thai plaintiffs' normal accounting records, but states these adjustments were necessary because the companies' normal records did not provide at all, or provided only minimally, for allocation of these shared costs between CPF and other pineapple products.

The court finds that Commerce erred in its determination to rely on the Thai plaintiffs' normal accounting practices to allocate fruit costs. Whether or not those methodologies were consistent with Thai GAAP, the court finds that the methodologies do not reasonably reflect actual costs as required by the statute. The methodologies are arbitrary and reflect neither the cost of the inputs nor any credible measure of the value of the outputs, as Commerce appears to recognize. Although Commerce repeatedly noted the unreliability of the Thai plaintiffs' allocation methodologies, it continued to employ them simply because they were consistent with Thai's GAAP. Furthermore, there is really no meaningful distinction between Dole's rejected "normal" methodology and the others which were accepted. Even if Malee's allocation is a very rough estimate of value it is nonetheless unreliable, and the others differ for arbitrary reasons, not because they are more accurate.

Commerce has never stated that foreign GAAP will suffice when it is unreliable. To the contrary, GAAP consistent methodologies are rejected when they do not reflect actual costs. *See, e.g., New Minivans from Japan*, 57 Fed. Reg. 21,937, 21,946 (Dep't Comm. 1992) (final determ. of LTFV sales). Maui's argument that respondents cannot reject their own GAAP consistent records is incorrect. The only issue is whether the records reflect actual costs. GAAP is concerned with overall

financial performance and not product specific cost allocation for antidumping purposes. Commerce should have followed its normal practice and rejected GAAP accounting records because they were unreliable and distortive of actual costs. Thus, Commerce's decision to rely on "normal" methodologies presented to it was arbitrary, capricious, not based on substantial evidence and contrary to law. The next question is what methodology or methodologies may be used.

Lurking in the background is not Commerce's desire to use distorted GAAP records, but rather its apparent change of heart regarding proper co-product cost allocation for antidumping purposes. Commerce is not seeking some "canned fruit" exception to the principle of weight/volume based allocation, as it appears to argue here. *See* discussion *infra*. It is stepping back from that methodology even in the steel area, where it vigorously supported weight-based allocation, in the past. *Cf. IPSCO III* (weight-based allocation of joint pipe product costs) *and Certain Carbon and Alloy Steel Wire Rod from Canada,* 59 Fed. Reg. 18,791, 18,795 (Dep't Comm. 1994) (final determ. of LTFV sales) (time instead of weight used to allocate steel fabrication costs; "use of tonnage * * * would result in the same cost per ton regardless of the grade of steel").

In this case Commerce has proffered a desire for a value-based allocation as between solids and juice products, although it accepted weight-based allocations among solid products. *Final Det.,* 60 Fed. Reg. at 29,560–61 (rejecting Thai plaintiffs' weight-based allocations). As indicated, Dole's "normal" allocation methodology was rejected and an average of Thai company allocation ratios was used. *Id.* But Commerce stated that for future reviews and assessments Dole's fruit costs should be allocated between CPF and pineapple juice products on the basis of historical net realizable value ("NRV"). *Id.* Commerce stated that:

> A reasonable fruit cost allocation methodology would be one which reflects the significantly different quality of the fruit parts which are used in the production of CPF versus those which are used in the production of juice products. One approach to deriving such an allocation methodology would be to compare the net realizable value of the CPF versus juice products over a period of years. Net realizable value (NRV) is commonly defined as the predicted selling price in the ordinary course of business less reasonable predictable costs of completion and disposal.

Id. (citing Charles T. Horngren & George Foster, *Cost Accounting: A Managerial Emphasis* (5th ed. 1982) at 534 [hereinafter *"Cost Accounting"]); see also Final Concur. Mem.* at 30–31 & n.11. Commerce declined to utilize the NRV methodology in this investigation based on Dole's verified sales data from the POI because the resulting allocation percentage differed significantly from the allocation percentages used in the books of the other respondents. *Final Det.,* 60 Fed. Reg. at 29,560. This is not a complete explanation, as will be explained. *See also Final Concur. Mem.* at 30–32. Commerce also did not obtain historical information in this investigation.

The Thai plaintiffs argue that weight is the appropriate basis for allocation because it is on the basis of weight that fruit costs are actually incurred. They claim that they purchase raw pineapple on a Thai baht per kilogram basis and that cost is the same for a kilogram of higher quality raw material used to make choice grade slices as it is for a kilogram of lower quality raw material used to make juice.

Commerce, however, stated that, "[b]ecause the parts of the pineapple are not interchangeable when it comes to CPF versus juice production, it would be unreasonable to value all parts equally using a weight-based allocation methodology." *Final Det.*, 60 Fed. Reg. at 29,561. Commerce likens the situation to that of a hog, where if the joint costs of a hog were assigned to its various products based on weight, center-cut pork chops would have the same unit cost as pigs' feet, lard, bacon, ham, etc., resulting in large profits for some cuts and consistent losses shown for others. *Id.* at 29,560. The hog example is found in Donald E. Keller, *Management Accountants' Handbook* (4th ed. 1992) at 11:2 [hereinafter *"Keller"]*. Commerce reasons that like the hog, the pineapple is comprised of various parts, *i.e.*, the cylinder, core, shells, etc. with different uses and values. *Final Det.* at 29,560–61. Commerce also noted that authoritative accounting literature provides examples of cost allocations in the canning industry dependent on two factors, a quantitative factor and a qualitative factor. *Id.* at 29,561 (citing *Keller* at 11:13). Commerce stated that:

> The output of finished products can be captured in the quantitative measure, which is used to allocate the direct preparation labor costs and other costs directly related to the quantity of raw fruit processed. The difference in the relative quality of the fruit used in each product is reflected in a qualitative factor, which is used to allocate the purchase cost of raw materials among products. The various grades or parts of the fruit are assigned a factor reflective of the quality of the fruit used for each product. With all of this in mind, we believe it is inappropriate to allocate fresh pineapple fruit costs to the various pineapple products solely on the basis of weight.

Id.[8]

The accounting citation is incorrect. It merely discusses the advantages of value-based allocation for normal costing purposes without discussing how to allocate in the canning industry specifically.[9] The Thai plaintiffs claim that, while pineapple parts are not interchangeable, this fact is irrelevant because although the value of different pineapple parts may be different, *the cost is all the same.* The Thai plaintiffs do admit that the pineapple meat from which juice primarily is made is of a lower quality than the material used to make many, though not all, solid products, and because solid products have a higher market value than juice

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[8] Commerce does not propose and no party here employed a fact-based unitary value/weight ratio for fruit allocation purposes.

[9] An article referred to in *Keller* at 11:14 does discuss the canning industry. It suggests a qualitative approach for cost allocation for various grades of fruit. Jankowski, "Cost and Sales Control in the Canning Industry," 36 N.A.C.A. Bull. at 376 (Nov. 1954). This is the opposite of Commerce's approach here. That is, cost allocation by weight among solid pineapple products was allowed.

products, it can be said that the juice raw material has a lower value than at least some canned pineapple raw material. They argue, however, that they pay the same cost when they buy pineapples regardless of the mix of higher- and lesser-valued products ultimately processed.

Dole argues that its weight-based methodology allocates fruit cost based on the weight of the net product output, *e.g.*, only the weight of the juice pressed from the pineapple meat, and not the pulp left behind, is included in the net product weight. Therefore, Dole claims that its allocation methodology does not value all parts going on the distorted weight basis that Commerce asserts. Thus, Commerce's shells, cores, etc. argument, as well as its hog analogy are overstated. Waste such as shells and pressed cores are given by-product treatment. *Final Det.* 60 Fed. Reg. at 29,566. One continuous fruit process yields a range of products from the whole fruit input. *See, e.g.* Malee Sec. D Resp. at 11–15; Pls.' Conf. App., Ex. 12. As indicated, among solid products including crushed pineapple (a low value solid product) cost allocation by weight was found acceptable. Thus, apparently it is only for the juice vs. solid product that Commerce proposes to use a raw fruit value-based allocation, if Thai GAAP consistent "normal" methodologies are rejected.

Dole also points out that the same accounting authorities relied upon by Commerce recognize the inappropriateness of a revenue-based or sales-price method when the purpose of the cost calculation is to validate prices:

> All sales-price methods are subject to one compelling criticism. Where cost is determined by price, price cannot be determined by cost. Therefore, all sales-price methods are circular for pricing decisions and inferentially so for many other types of decisions that have sales price as a fundamental factor.

Keller at 11.18; *see also* Charles T. Horngren & George Foster, *Cost Accounting: A Managerial Approach* at 532 (7th ed. 1991) (stating, "[p]hysical measures are sometimes preferred to sales value methods in rate-regulation settings when the objective is to set a fair selling price. Why? Because it is circular reasoning to use selling prices as a basis for setting a selling price, as would be the case under the sales value at split-off method").[10]

If joint inputs could be as easily distinguished as Commerce claims, there would be no need for allocation. In every co-product case where output prices vary greatly among co-products, value based allocation is intuitively appealing for antidumping purposes, but it is not permitted. In *IPSCO, Inc. v. United States,* 13 CIT 402, 405–06, 714 F. Supp. 1211, 12–13–15 (1989) [hereinafter *"IPSCO II"],* this court addressed the issue of how to allocate joint costs between co-products—"prime" and "limited-service" steel pipe or oil country tubular goods ("OCTG").[11] In

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[10] Although rate regulation *per se* is not involved here, antidumping laws relate to price setting, and, thus, are analogous.

[11] Prime OCTG meets American Petroleum Institute ("API") standards and sells at premium prices, whereas limited-service OCTG does not meet API standards tolerances and therefore sells at a discount. *See IPSCO III,* 965 F.2d at 1057–58.

the underlying investigation, Commerce allocated material, labor, and overhead costs uniformly to prime and limited service pipe because there was no ascertainable distinction in the costs actually incurred in producing these two products. 13 CIT at 405, 714 F. Supp. at 1215. This court rejected Commerce's methodology, remanding the case with instructions to account for output *value* differences in allocating costs, as Commerce would do here, first by accepting Malee's rough value allocations and second, by proposing an historic NRV methodology for Dole. The court stated that, "[b]y declining to account for differences in value and treating prime and limited service products identically in its calculations of foreign market value, [Commerce] made an unreasonable fair value comparison." *Id.* Following *IPSCO II* on remand, Commerce allocated costs between prime and limited-service pipe based on relative sales value. *IPSCO III,* 965 F.2d at 1061. This court approved that result.

The Federal Circuit reversed this court's *IPSCO II* decision, found that a value-based allocation violated the antidumping statute, and also found that Commerce's original weight-based methodology was *the* correct interpretation of the law. *IPSCO III,* 965 F.2d at 1060–61. The appellate court in *IPSCO III* noted that, "[t]he broad language of section 1677b(e) does not at any point expressly authorize adjustment of these production costs to account for products of a lower grade or less value." *Id.* The court then found that the legislative history of Title 19 "confirms the statute's unambiguous intent to provide cost of production as an independent yardstick for deciding whether home and export sales prices are suitable for fair value comparisons." *Id.*

The Federal Circuit found that calculating costs for both limited-service and prime products on the basis of their relative prices in the United States market was unreasonable and circular as "[t]he selling price of pipe became a basis for measuring the fairness of the selling price of pipe." *Id.* at 1061. The court stated that, "[t]his circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value." *Id.* Additionally, the Federal Circuit found that as Commerce's original weight-based methodology was a consistent and reasonable interpretation of the statute, this court erred in substituting "its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* (quoting *Chevron U.S.A. v. Natural Res. Defense Council,* 467 U.S. 837, 844 (1984)). Thus, the Thai plaintiffs and Dole claim that the holding in *IPSCO III* prohibits Commerce from shifting costs from one co-product to the other simply because there is a difference between them in market values, and despite the appellate court's final statement on this issue, the entire opinion speaks of no statutory ambiguity.

In its final determination, Commerce concluded that "[c]ontrary to respondents' arguments, however, *IPSCO* is not controlling in this case." *Final Det.,* 60 Fed. Reg. at 29,561. Commerce claims that *IPSCO*

did not hold that in every instance value-based allocations are legally impermissible and attempts to distinguish *IPSCO* on its facts. *See id.* Commerce notes that in *IPSCO,* "[t]here were no physical differences between the two grades of pipe, only differences in quality and market value." *Id.; see IPSCO III,* 965 F.2d at 1058. Commerce also states, "the same materials, labor, and overhead went into the manufacturing lot that yielded both grades of pipe." *IPSCO III,* 965 F.2d at 1058. Commerce allocated production costs equally between the two grades of pipe because they were produced simultaneously and had identical production costs. *Id.* Commerce argues that *IPSCO III* suggests that the courts will defer to Commerce's preference for reliance upon respondents' normal allocation methodologies, particularly where there are significant differences in raw material, *i.e.,* the primary use of the cylinder in the production of CPF and the additional use of the shells, cores, and ends, in the production of juice and concentrate, as well as differences in processing, labor, and overhead. *See Final Det.,* 60 Fed. Reg. at 29,561.

The Thai plaintiffs counter that Commerce's attempt to distinguish *IPSCO III* fails because although in *IPSCO III* materials, labor, and overhead costs were shared, whereas in this case, there are clear differences in labor and overhead costs, this fact is immaterial because the issue of cost allocation in this case pertains only to *shared raw material costs.* They are correct. They also claim that all pineapple using co-products incur identical baht per kilogram fruit costs, just as prime and limited service pipe incurred identical material, labor, and overhead costs. The Thai plaintiffs argue that to the extent that co-products have shared costs that are incurred uniformly, they should be allocated uniformly. Further, the Thai plaintiffs assert that in *IPSCO III,* as in this case, it is impossible to separate out the different quality inputs before the costs are incurred. Instead costs are incurred uniformly and all at once, at the exact same rate for high quality inputs as for low quality inputs. The Thai plaintiffs contend that Federal Circuit in *IPSCO III* held that in these circumstances, costs must be allocated uniformly among the resulting high-value and low-value products.

As indicated, the court finds that Commerce overstates distinctions with *IPSCO III* and to some extent it also misstates the facts of this case, as explained previously. *See supra* at 23. The court finds that Commerce may not rely on output price-based allocation methodologies given the holding in *IPSCO III. IPSCO II* allowed Commerce to choose between any number of value-based methodologies. *IPSCO II,* 13 CIT at 406 n.6, 714 F. Supp. at 1215 n.6. The Federal Circuit approved none of those methodologies. Ascertaining actual costs per product is just as impossible for pineapple co-products as it was for pipe co-products. The court made no exceptions for intentionally produced lower value outputs, as may be the case here, and it certainly did not say that weight-based methodologies are to be used only when they work to respondents' disadvantage.

The court declines to reject the words of the Federal Circuit and to limit *IPSCO III* to its facts. The Federal Circuit specifically found that Commerce's weight-based cost (non-value) methodology was *correct,* not just permissible. It in no way suggested that Commerce had discretion to choose a value-based methodology, rather it found output price-based methodologies circular. The Federal Circuit knows how to allow Commerce discretion. *See, e.g., Federal-Mogul Corp. v. United States,* 63 F.3d 1572, 1581–82 (Fed. Cir. 1995) (Commerce may choose among any number of permissible VAT methodologies).[12] Despite the final paragraph which repeats the general rule of deference to agency decisions, fully three-fourths of *IPSCO III* is in mandatory language. The statute is declared unambiguous. Thus, no true *Chevron* deference to an agency's choice among several permissible interpretations is involved. 965 F.2d at 1060. The court must simply defer to the *one* correct statutory interpretation. It is a rare opinion that could not be more clearly written. The court, however, declines to dismiss the bulk of *IPSCO III* as simply loose language. The court must assume that *IPSCO III* means what it says.

Joint cost allocations for co-products are an accounting dilemma. No method is totally satisfactory. The *IPSCO III* court apparently decided that Congress made a choice to avoid circularity, despite the predictable distortive effects on COP and CV for some co-products. While this court may not agree that Congress made such a choice and indeed believes that the circularity problems can be controlled for, and, thus, that output price-based methodologies which avoid the worst distortions potentially caused by POI U.S. price-based allocations are permissible, this court has no authority to approve them.[13] The appellate court has spoken on this issue and only it or Congress may change the law. Accordingly, this issue is remanded. Commerce may choose to accept the weight-based allocation methodologies put forth by the Thai plaintiffs and Dole if they are otherwise acceptable, because these are cost, not price-based, methodologies, or it may rely on another non-output price-based cost allocation methodology.

III. *Weighting the Dumping Margin for Dole's United States Sales:*

Commerce allowed Dole to report all of its United States sales, including those of Philippine origin, for each product category for which Dole had shipments from Thailand during 1993, because Dole was unable to distinguish between its pineapple grown and canned in Thailand and its pineapple grown and canned in the Philippines. In its preliminary and final determinations, Commerce calculated a dumping margin for Dole by weight-averaging the dumping margin for each product category according to the ratio of shipments of CPF from Thailand to total vol-

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[12] The court here uses value as did the court in the *IPSCO* cases to refer to output price or net realizable value of the outputs. It does not refer to value as cost-based value.

[13] The decision to use historical value allocation for *Dole* in the future appears to be another attempt to sidestep *IPSCO III.* While in *IPSCO III* the remand decision rejected by the appellate court used a POI-based value allocation, *IPSCO III*'s rejection of value-based allocations is unlimited.

ume shipped from both Thailand and the Philippines during the last seven accounting periods of 1993, *i.e.*, July 19 through December 31, 1993. *Prelim. Det.*, 60 Fed. Reg. at 2736; *Final Det.*, 60 Fed. Reg. at 29,562. Commerce used the July-December accounting period as the basis for establishing the ratio rather than the entire 1993 period because Dole reported that its average inventory turnover rate was six to seven months. *Prelim. Det.*, 60 Fed. Reg. at 2736.

After Commerce issued its final determination, petitioners pointed out a flaw in Commerce's rationale: for certain products sold in the United States in the first half of 1994, the shipment data showed that (a) they had been shipped from Thailand to the United States only in the first half of 1993, and (b) they were not shipped at all from the Philippines to the U.S. in 1993. As a result, the sales of these products, which the petitioners emphasized showed positive dumping margins were given zero weight using Commerce's Period 7–13, 1993 shipment ratios. While describing this flaw as an error in Commerce's methodology, petitioners nevertheless asserted that the result was "unintentional," and for that reason qualified as a clerical or ministerial error that could be corrected after issuance of the final determination.

Commerce agreed that the result was "unintentional" and reasoned that its methodology:

> was only intended to influence the weight assigned to the PUDD[14] calculated for those UPCs where Dole had shipments from both Thailand and the Philippines. Any elimination of PUDD values calculated on UPCs sourced exclusively from Thailand was an oversight on [Commerce's] part and was unintentional.

Ministerial Errors Decision Mem. at 6 (June 28, 1995) [hereinafter *"Ministerial Errors Mem."];* P.R. Doc. 342; Defs.' App., Ex. 6. Pursuant to 19 C.F.R. § 353.28(c) (1994), Commerce recalculated Dole's dumping margin in its amended final determination so as to include products exclusively of Thai-origin that had been excluded from the final dumping calculation because they were shipped prior to the seven month accounting period examined by Commerce. *See Amended Final Det.*, 60 Fed. Reg. at 36,776; *Ministerial Errors Mem.* at 4–6. For these products, Commerce used a full year 1993 weighting period as the basis for establishing the ratio; for the remaining sales, Commerce continued to use the July-December accounting period as the basis for the ratio. *See Amended Final Det.*, 60 Fed. Reg. at 36,776.

Dole claims that Commerce's inconsistent use of different weighting factors in the amended final determination is arbitrary and unreasonable. Dole argues that it is inherently arbitrary to calculate weighting factors based on an average inventory turnover for all products, but then make exceptions for individual products with different turnover ratios. Such selective application, Dole asserts, destroys the presumed

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[14] The "PUDD" (potentially uncollectible dumping duties) is the absolute amount of the dumping duties (as opposed to a percentage of volume) that would have been collected from the United States sales under investigation if an antidumping duty order had been in effect.

congruence between the set of products used to calculate the average and the set of products to which the results are applied. Without such congruence, the justification for using the average inventory period is lost. Dole contents that in citing examples of certain products sold in the POI but not shipped in the second half of 1993, petitioners have simply demonstrated that the July to December 1993 shipment data do not accurately represent the source of the products sold in the POI, and that a longer period should be used.

Upon reconsideration of this issue, Commerce agrees with Dole that it should have applied a consistent weighting factor across the board. The court agrees. This issue is remanded so that Commerce may use the full-year 1993 shipment volumes, supplied by Dole in its Section C Questionnaire Response, to weight the dumping margin for all Dole products.

IV. *Dole's G&A Expense Factor:*

In its Section D Questionnaire Response, Dole computed a G&A factor based upon 1993 audited financial data for Dole Food Company, Dole Packaged Foods, and Dole Thailand. Dole Sec. D Resp. at 16 & Ex. D–12 (Dec. 19, 1994) [hereinafter "Dole Sec. D Resp."]; C.R. Doc. 52; Pl.-Intvr.'s Conf. App., Ex. 10. Dole subsequently provided a revised G&A factor based upon 1994 audited financial data for Dole Food Company and upon 1994 unaudited financial data for Dole Thailand. Dole COP/CV Verification Report at 15 (Apr. 5, 1995); C.R. Doc. 115; Pl.-Intvr.'s Conf. App., Ex. 15; and Dole Letter to Commerce (Apr. 27, 1995); P.R. Doc. 295; Pl.-Intvr.'s Conf. App., Ex. 18 (Dole Food Company, Inc.'s 1994 annual report containing audited financial statements).

In its final determination, Commerce calculated G&A expenses using Dole's 1993 audited financial information consistent with Commerce's practice of calculating G&A expenses from audited financial statements that most closely correspond to the POI. *Final Det.*, 60 Fed. Reg. at 29,565; *see also Furfuryl Alcohol from Thailand*, 60 Fed. Reg. 22,557, 22,561 (Dep't Comm. 1995) (final determ. of LTFV sales) (stating "[u]nder ordinary circumstances, the most appropriate full-year G&A period is that represented by the latest fiscal year for which the respondent has complete and audited financial statements").

Dole objects to Commerce's determination to rely on its 1993 financial statements for both Dole Food Company and Dole Thailand. Dole argues that Commerce should have based Dole's G&A expense factor upon a combination of Dole's 1993 audited financial data for Dole Thailand and Dole's 1994 audited financial data for Dole Food Company. Commerce claims, however, that this approach would have been inconsistent with Commerce's practice and policy. In calculating G&A, Commerce asserts that it is looking at a "snapshot" of expenses incurred over the specific period of operations reported in the respondents' financial statements. Under Dole's proposed reporting methodology, Commerce claims that companies within its consolidated group would be allowed to mix and match financial data from different periods, which would defeat the snapshot approach to Commerce's G&A factor calculation.

Dole counters that, unlike a snapshot, which records the situation at a given moment in time, a full-year record of G&A expenses captures all such expenses incurred over the full fiscal year, thereby capturing both recurring daily expenses and periodic annual expenses. Such expenses, Dole contends, will change from year to year for a company, particularly where one-time restructuring expenses are incurred. Dole also argues that the mere possibility that in some cases a respondent might attempt to manipulate its data by withholding release of audited annual reports does not support creation of an irrebuttable presumption that such manipulation occurs in every case.

The court agrees with Commerce that Dole's proposed methodology would lead to inconsistent practices and, in fact, is contrary to Dole's position that a consistent time period must be used in regard to margin weighting. Commerce's determination to rely on the audited 1993 financial reports for Dole Food Company and Dole Thailand was reasonable and otherwise in accordance with the law. Accordingly, the court affirms Commerce's determination in regard to Dole's G&A expense factor.

V. *Dole's Inventory Carrying Cost:*

Inventory carrying cost measures the imputed cost incurred by a company for storing merchandise in inventory. Commerce is unable to calculate the actual cost for inventory carrying costs because such costs are not found in a company's books. Thus, Commerce imputes the opportunity cost of holding the merchandise in inventory prior to the sale to an unrelated customer. Commerce deducts inventory carrying costs, measured from the date of production is completed through the date of shipment to an unrelated customer, from exporter sales price and FMV. *See Torrington Co. v. United States,* 44 F.3d 1572, 1579–81 (Fed. Cir. 1995) (upholding this practice).

With respect to the interest rate used to calculate inventory carrying cost, Commerce explains that its practice is to use the short-term rate in the currency in which the cost of the inventory is incurred by the entity that bears the costs of producing or acquiring such inventory. *See, e.g., Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan,* 57 Fed. Reg. 4975, 4984 (Dep't Comm. 1992) (final results) [hereinafter *"TRBs Final Results"].* If there is evidence, however, that an entity other than the one holding the merchandise in inventory bears the cost of carrying the merchandise for a portion of the time the merchandise is held in inventory, Commerce will use this entity's short-term interest rate to calculate that portion of the inventory carrying cost. *Id.* For example, in *TRBs Final Results,* Commerce used the Japanese parent company's short-term interest rate to calculate United States inventory carrying cost because the payment terms that the parent company extended to its United States subsidiary indicated that the parent company bore the cost of maintaining the inventory in the United States. *Id.; see also Timken Co. v. United States,*

18 CIT 942, 948–49, 865 F. Supp. 881, 886–87 (1994) (upholding this determination).

Here, in reporting inventory carrying cost, Dole applied a United States dollar denominated short-term borrowing rate to the actual cost of manufacture of the inventory for the time that the merchandise was held in inventory in the United States, Thailand, and Germany. *See Final Concur. Mem.* at 4–5. In its final determination, Commerce recalculated Dole's inventory carrying cost for the time that the merchandise was held in inventory in Thailand using a Thai baht-denominated, short-term borrowing rate. *Final Det.*, 60 Fed. Reg. at 29,554, 29,556; *see also Final Concur. Mem.* at 5. For the time that the merchandise was on the water and in inventory in the United States or Germany, Commerce used the United States dollar-denominated, short-term borrowing rate supplied by Dole and confirmed by Commerce at verification. *Final Det.*, 60 Fed. Reg. at 29,554, 29,556.

Dole contends that Commerce improperly substituted an imputed baht interest rate for Dole's actual dollar cost of borrowing in calculating Dole's inventory carrying cost. Dole argues that Dole's use of Dole Food Company's actual dollar-denominated short-term cost of borrowing as the applicable rate of interest was consistent with Commerce's then-prevailing practice under *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460–61 (Fed. Cir. 1990), of calculating both credit expenses and imputed interest expenses using the lowest borrowing rate available to the respondent. *See also Class 150 Stainless Steel Threaded Pipe Fittings from Taiwan*, 59 Fed. Reg. 38,432, 38,434 (Dep't Comm. 1994) (Commerce "is required to use the lowest rate at which the respondent has borrowed or to which the respondent has access"). Dole asserts that the court in *LMI-La Metalli* recognized that it defies commercial reality to presume that a company would borrow at a high home currency interest rate when a lower dollar rate is available. *See LMI-La Metalli*, 912 F.2d at 460 (stating, "we agree with LMI that it is not reasonable to presume that a commercial enterprise would borrow at almost twice the available rate").

Dole claims that in its final determination, Commerce adopted a modified methodology for calculating imputed credit costs, and then extended that methodology to inventory carrying costs. Dole argues that Commerce failed to properly apply its own stated methodology, which applies an interest rate using the currency of the pending transaction. Dole contends that because all of Dole Thailand's export sales are in U.S. dollars, it is the cost of holding inventory pending receipt of U.S. dollars that defines the relevant currency under that methodology. Dole also points out that as a Thai corporation, Dole Thailand keeps its day-to-day financial statements in baht in fulfillment of local statutory requirements, but as a subsidiary of Dole Food Company, Dole Thailand also prepares dollar-denominated financial statements, which are used to consolidate its financial position in the financial statements of Dole Food Company. Finally, Dole claims that the imputation of a higher

baht-denominated interest rate is inconsistent with commercial reality and Dole Thailand's own borrowing practices. Dole claims the current liabilities consist overwhelmingly of payables to affiliates (approximately 80% of total current liabilities), with only about 3% of total current liabilities in debt to banks, which might be local debt. Dole Sec. D. Resp., Ex. D–4. Accordingly, Dole argues that the imputed cost of holding finished goods inventory is borne by the consolidated Dole group, and is properly calculated based on the lower dollar-based cost of borrowing available to Dole Food Company.

Commerce counters that there is no record evidence to corroborate Dole's statement that the *imputed cost* of holding finished goods inventory in Thailand is borne by the consolidated Dole group. In contrast, Commerce noted that in *Timken Co.*, specific payment terms, allowing for delayed payment for the imported merchandise, formed the evidentiary basis for Commerce's conclusion that the American subsidiary could have benefitted from its Japanese parent's ability to borrow money in Japan. 18 CIT at 948–49, 865 F. Supp. at 886–87. Dole's contentions have not been adequately addressed. If Dole's borrowings are largely in U.S. dollars because they are debt to U.S. affiliates, such specific evidence would seem to be similar to that accepted in *Timken*. Commerce must address these arguments and make a rational determination. Accordingly, the court finds that Commerce's determination in this respect not supported by substantial evidence and it is remanded.

VI. *Dole's Pre-Sale Movement and Import Duty Expenses:*

Dole reported pre-sale movement and import duty expenses for its third country sales. In its final determination, Commerce concluded that Dole's third country movement and import duty expenses did not bear a direct relationship to the sales under consideration and, therefore, could not be deducted fully as an ordinary circumstance-of-sale ("COS") adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.56(a)(1) (1994). *Final Det.*, 60 Fed. Reg. at 29,563–64. Commerce also concluded that to treat similar United States movement and import expenses as indirect expenses for purposes of the ESP offset cap would be contrary to 19 U.S.C. § 1677a(d)(2)(A). *See Sharp Corp. v. United States*, 63 F.3d 1092, 1097 (Fed. Cir. 1995).[15] Thus, the advantage to be gained through the ESP offset to FMV for indirect expenses was limited.

Dole argues that the pre-sale movement and import duty expenses are directly related to its third country sales and, as such, should have been deducted fully from FMV. To determine whether pre-sale movement expenses are direct, Commerce examines the respondent's pre-sale warehousing expenses because Commerce considers the pre-sale movement charges incurred in positioning the merchandise at the warehouse to be linked, for analytical purposes, to pre-sale warehousing expenses.

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[15] The *Sharp* decision sets forth the background of the ESP offset and ESP offset cap.

Final Det., 60 Fed. Reg. at 29,563; *see also The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Slip Op. 95–91 at 5–6 (May 15, 1995), *aff'd*, 95 F.3d 1164 (Fed. Cir. 1996) (unpublished table decision). Commerce explains that it typically "treats expenses associated with inventory that is held for purposes of production planning and being able to ship the merchandise quickly with a regular turnover as indirect selling expenses because this inventory is maintained by the company as a service to all customers." *Final Det.*, 60 Fed. Reg. at 29,563. Commerce acknowledges, however, that in limited circumstances, it does recognize certain pre-sale expenses as direct. *Id.* For freight and warehouse expenses, Commerce claims that those circumstances usually involve products channeled or customized for certain buyers. *See, e.g., Stainless Steel Bar From Italy*, 59 Fed. Reg. 66,921, 66,928–29 (Dep't Comm. 1994) (final determ. of LTFV sales) (allowing COS adjustment where pre-sale warehousing expenses incurred for designated amount of subject merchandise with certain specifications for particular customers).

In the present case, Dole reported two types of third country warehousing expenses: (1) those associated with moving the merchandise "in and out" of the warehouse; and (2) warehouse storage charges. Dole Sec. B Resp. at 11–12 (Sept. 20, 1994); P.R. Doc. 90; Defs.' App., Ex. 9. Commerce found that Dole had not provided evidence to substantiate its claim that either pre-sale warehousing expense was directly linked to the sales under investigation. *Final Det.*, 60 Fed. Reg. at 29,564. Commerce listed its reasons as follows:

> (1) The amount of time that passes between the date the merchandise arrives at the European warehouse and the date it is shipped to the third country customer; (2) in most instances the third country sales were made from inventory * * *; (3) the merchandise held in the European warehouses is not pre-designated for sale to a specific customer; (4) the merchandise sold from inventory was not specialty merchandise * * *; (5) the merchandise that was held in inventory was sold to numerous third country customers during the POI; (6) Dole incurs the cost of pre-sale warehousing expenses, not the customer * * *; and (7) in its questionnaire response Dole did not claim the warehouse storage charges as direct selling expenses; rather, Dole characterized warehouse storage costs as indirect expenses.

Id. Thus, Commerce concluded that because Dole's third country pre-sale warehouse expenses were indirect, the expenses involved in moving the merchandise to the warehouse were also indirect. *Id.*

Dole contends that unlike other types of selling expenses, such as general advertising or sales staff salaries, third country movement expenses are directly tied to subsequent individual sales of the products because they add value directly to the individual articles sold. Dole claims that it is indisputable that to the German customer, a shipment sold delivered, duty paid in Germany has greater value than a shipment sold FOB Bangkok. Dole argues that by moving goods from Thailand to

Germany and paying 24 percent *ad valorem* import duties, Dole has added identifiable value to those goods and upon their subsequent sale, that value is transferred to the customer. Dole likens this situation to selling costs incurred by the producer that inure to the benefit of the purchaser, such as advertising expenses "assumed by the producer * * * on behalf of the purchaser." *See* 19 C.F.R. § 353.56(a)(2). Dole distinguishes this situation from that in *Ad Hoc Committee,* Slip Op. 95–91, where the movement was of inventory from the factory to the warehouse in the home market, which Dole argues is neither designated to any specific market nor significantly advanced in value. This distinction is not meaningful. Presumably both direct and indirect expenses add value to the merchandise. Indirect expenses are not ignored, they are simply treated differently. Commerce did not err in finding that there is an insufficient tie of these expenses to particular sales to warrant direct expense treatment.

Dole also points out that the Federal Circuit has recently confirmed that pre-sale as well as post-sale movement expenses may be deducted from FMV as a COS adjustment. *Torrington Co. v. United States,* 68 F.3d 1347, 1353–56 (Fed. Cir. 1995). As indicated, limited pre-sales expenses have been found to be direct. *Torrington* did not change this. Commerce is correct that Dole's reliance on *Torrington* is misplaced as the court did not reach the issue of whether Commerce's analytical link between pre-sale movement expenses and pre-sale warehousing expenses is in accordance with law, as it did in *Ad Hoc Committee.* The court merely approved Commerce's use of the COS standards to determine whether home market pre-sale movement expenses should be deducted in the calculation of FMV. *Id.* at 1356. This does not change the fact that, pursuant to 19 C.F.R. § 353.56(a)(1), Commerce will make a full COS adjustment only if the expenses are determined to be directly related to the sales under investigation. In the light of the foregoing, the court finds that Commerce's determination that Dole's pre-sale third country movement expenses were not directly related to the sales under investigation and were therefore not fully deductible under the COS provision was reasonable and supported by substantial evidence.

Alternatively, Dole argues that if its third country pre-sale movement expenses must be characterized as indirect, then Commerce erred in refusing to treat similar United States movement expenses as indirect for purposes of the ESP offset cap, as well. Commerce, however, while recognizing that there is an "admitted imbalance" in its treatment of Dole's United States movement expenses and its treatment of third country movement expenses, concluded, after examining the then applicable statutory and regulatory provisions, that it was "without the authority" to correct the imbalance. *Final Concur. Mem.* at 18. In its final determination, Commerce stated, "[w]e do not have the option of treating comparable expenses on U.S. sales as indirect in nature because such sales are ESP sales, and [19 U.S.C. § 1677a(d)(2)(A)] clearly requires the deduction of such expenses in arriving at USP." *Final Det.,*

60 Fed. Reg. at 29,564. Section 1677a(d)(2)(A), Title 19, United States Code provides in relevant part:

> The purchase price and the exporter's sales price shall be adjusted by being—
>
> * * * * * * *
>
> (2) reduced by—
>
> * * * * * * *
>
> (A) * * * the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; * * *.

19 U.S.C. § 1677a(d)(2)(A). The Federal Circuit recently came to the same conclusion, finding that treatment under the agency created ESP offset cap is inappropriate for expenses already subject to specific statutory adjustment. *Sharp Corp. v. United States,* 63 F.3d at 1097.

Dole claims *Sharp* is not applicable here because (1) it involved home market selling expenses not substitute third-country transport and duty expenses; (2) a court cannot uphold an agency decision on grounds not relied upon by the agency; and (3) *Sharp* did not consider the legislative history of Congress' recent amendment of the antidumping law to expressly provide for the deduction of all movement expenses from FMV. Finally, Dole claims that 19 U.S.C. § 1677a(d)(2)(A) says nothing about the categorization of U.S. pre-sale movement and import duty expenses. Of course, the new statute does not apply and the old statute gives a clear answer. Thus, Dole's arguments are either irrelevant or incorrect on this issue.

The court finds that, in light of the Federal Circuit decision in *Sharp,* Commerce's refusal to include U.S. pre-sale movement expenses in setting the ESP offset cap pursuant to 19 U.S.C. § 1677a(d)(2)(A) was in accordance with law. Accordingly, the court affirms Commerce's decision in this respect.

CONCLUSION

This matter is remanded for Commerce to use a consistent time period for calculating the weighted average dumping margin for all Dole products, to correct the effective date of the antidumping duty order with respect to Dole, to consider Dole's evidence in support of a U.S. dollar inventory cost measure, and to use a non-output price-based methodology to allocate joint costs between solid and non-solid outputs. Remand results should be returned within 60 days. Any new objections may be filed within 11 days thereof. Any responses are due within 11 days thereafter.

(Slip Op. 96–183)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF (U.K.) LTD., AND PRATT & WHITNEY CANADA INC., DEFENDANT-INTERVENORS

Court No. 91–07–00528

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF SVERIGE AB, DEFENDANT-INTERVENORS

Court No. 91–07–00529

FEDERAL-MOGUL CORP. AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., CATERPILLAR INC., MINEBEA CO., LTD., AND NMB CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SFK USA INC., SKF FRANCE, S.A., SNR ROULEMENTS, SNR BEARINGS, USA, INC., EUROCOPTER FRANCE, AEROSPATIALE HELICOPTER CORP., AND PRATT & WHITNEY CANADA INC., DEFENDANT-INTERVENORS

Court No. 91–07–00531

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIE, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENORS

Court No. 91–07–00532

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF GMBH, GMN GEORG MULLER NURNBERG AG, INA WALZLAGER SCHAEFFLER KG, INA BEARING CO., INC., NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, FAG KUGELFISCHER GEORG SCHAFER KGAA, AND PRATT & WHITNEY CANADA INC., DEFENDANT-INTERVENORS

Court No. 91–07–00533

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT AND SKF USA INC., SKF FRANCE, S.A., AEROSPATIALE DIVISION HELICOPTERES, AND AEROSPATIALE HELICOPTER CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00562

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF GMBH, GMN GEORG MULLER NURNBERG AG, NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, CATERPILLAR INC., FAG KUGELFISCHER GEORG SCHAFER KGAA, INA WALZLAGER SCHAEFFLER KG, INA BEARING CO., INC., MESSERSCHMITT-BOELKOW-BLOHM, GMBH, AND MBB HELICOPTER CORP., DEFENDANT-INTERVENORS

Court No. 91-08-00567

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIE, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENORS

Court No. 91-08-00568

(Dated November 13, 1996)

TSOUCALAS, *Senior Judge:* By Court Order dated May 16, 1996, the Court affirmed the final remand results of the Department of Commerce, International Trade Administration for the above-captioned cases. All other issues having been decided by this Court, it is hereby

ORDERED that the above-captioned cases are dismissed.

(Slip Op. 96-184)

BÖHLER-UDDEHOLM CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND ALLEGHENY LUDLUM STEEL CORP., WASHINGTON STEEL CORP., AND G.O. CARLSON, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 95-08-01024

[ITA determination remanded.]

(Dated November 14, 1996)

O'Donnell, Byrne & Williams, (R. Kevin Williams and *Michael A. Johnson)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Randi-Sue Rimerman), Carlos A. Garcia,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC, (Paul C. Rosenthal, John B. Brew and *Jeffrey S. Beckington)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This case is before the court on plaintiff Böhler-Uddeholm Corporation's ("Böhler-Uddeholm") Rule 56.2 motion for judgment upon the agency record. Böhler-Uddeholm filed this action

challenging the defendant United States Department of Commerce's ("Commerce") antidumping findings[1] that flat rolled and forged UHB Stavax ("Stavax") and UHB Ramax[2] ("Ramax") are within the "class or kind of merchandise" covered by the antidumping finding issued in *Stainless Steel Plate from Sweden,* 38 Fed. Reg. 15,079, 15,079 (Treas. Dep't 1973). Böhler-Uddeholm contends that Commerce's antidumping findings were unsupported by substantial evidence on the agency record and not in accordance with law. The court remands this matter to Commerce to: (1) apply the 1976 standards to determine whether Treasury erred in its post-finding scope determination, and (2) if Treasury erred, correct the antidumping scope determination by applying the standards in effect in 1976.

BACKGROUND

Since 1972, Böhler-Uddeholm has manufactured Stavax and Ramax, two specially alloyed grades of steel which are produced and marketed solely for use in making molds (Stavax) and mold holders (Ramax). The majority of Böhler-Uddeholm's imports consist of forged Stavax and Ramax, although Böhler-Uddeholm also imports a flat rolled version of the products.

Stavax and Ramax meet the TSUS[3] and HTSUS[4] tariff definitions of stainless steel and do not meet the tariff definition of stainless tool steel. Notwithstanding the tariff definitions of the merchandise in issue, plaintiff contends that for purposes of this action and the antidumping finding of 1973, its products are stainless tool steel.[5] Böhler-Uddeholm does not produce any grade of AISI 300 or 400 series of stainless steel plate. Instead, Stavax and Ramax, whether flat rolled or forged, are considered modified AISI grades 420 and 420F because their exact alloy contents are not contained in any AISI specification. In addition, Böhler-Uddeholm has always marketed the products as stainless tool steel used for the making of plastic molds.

A. *1973 Dumping Finding:*

Treasury issued its antidumping finding covering stainless steel plate from Sweden on June 5, 1973. Treasury's investigation began when Jessop Steel Co. ("Jessop"), a domestic producer, filed a petition with Treasury in 1972 alleging that Swedish stainless steel plate sold in the

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[1] Commerce issued two letter rulings. The first, dated July 11, 1995, concerned the scope of the 1973 dumping finding on stainless steel plate from Sweden with regard to three products, Stavax, Ramax and UHB 904L, when flat rolled. *Stainless Steel Plate from Sweden,* (Dep't Comm. 1995)(final scope ruling and mem., flat rolled products) at 21; Pl.'s App., Ex. 2. The second, dated November 2, 1995, concerned the same 1973 scope finding with regard to the same three products when forged. *Stainless Steel Plate from Sweden,* (Dep't Comm. 1995)(final scope ruling and mem., forged products) at 33; Pl.'s App., Ex. 3. Neither letter was published in the Federal Register.

[2] Both letter rulings included UHB 904L in the class or kind of merchandise of stainless steel plate. UHB 904L is not produced by Böhler-Uddeholm and Commerce's determination with respect to UHB 904L is not contested.

[3] The Tariff Schedule of the United States ("TSUS") defines stainless steel as "any alloy steel which contains by weight less than 1 percent of carbon and over 11.5 percent of chromium." TSUS Headnote 2(h)(iv) to Subpart B, Part 2, Schedule 6.

[4] The Harmonized Tariff Schedule of the United States ("HTSUS") defines stainless steel as "[a]lloy steels containing, by weight 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements." HTSUS Section XV, Ch. 72, Note 1(e).

[5] Tool steel is defined in terms of carbon content and chromium. HTSUS Section XV, Ch. 72, Addtl. U.S. Note 1(e).

United States violated the Antidumping Act of 1921. In its petition, Jessop defined "stainless steel plate" as:

> a flat rolled product in thicknesses 0.1875 in. or more, and in widths over 10 in., having various finishes, although normally a No. 1 finish is supplied (hot rolled, annealed and pickled). The term "stainless" implies a resistance to staining, rusting and pitting in the air and generally defines a chromium content in excess of 11% but less than 30%.

Petition from Jessop Steel Co. at 53 (Apr. 20, 1972) [hereinafter "Petition"]; Pl.'s App., Ex. 8. Jessop attached to its petition a portion of the AISI Products Manual, which defined "plates" as "flat rolled or forged." Petition at 66.

The domestic industry's petition listed six major end-use markets for stainless steel plate, as well as other significant uses for the product.[6] In addition, Jessop provided examples of price comparisons between stainless steel plate sold in Sweden and imported Swedish stainless steel plate sold in the United States.[7] All of the listed examples concerned the AISI 300 series of stainless steel plate.

The Tariff Commission subsequently conducted its investigation of injury to the United States industry. The Tariff Commission noted that "[v]irtually all imports and the great bulk of U.S. production of stainless-steel plate are in four basic AISI grades [in the 300 series]." Tariff Commission Publ. 78, Stainless Steel Plate from Sweden Determination of Injury and Staff Report at 84 (May 1, 1973) [hereinafter "Treasury Determination of Injury"]; Pl.'s App., Ex. 11. In its finding of injury, however, the Tariff Commission reviewed import statistics for all grades of stainless steel plate.

The Tariff Commission also listed the capacities of all domestic producers considered as part of the injured domestic industry. Two companies were not included as part of the injured industry: Bethlehem Steel which was expressly excluded and Crucible Steel which was not mentioned at all. Treasury Determination of Injury at 94–100. These two companies made plastic mold steel, a product in direct competition with Stavax and Ramax.[8] While their products met the tariff definition of stainless steel, the products were sold as stainless tool steel, as were Stavax and Ramax.

B. *1976 Treasury Post-Finding Scope Determination:*

On June 17, 1976, Böhler-Uddeholm requested that Treasury issue a determination excluding Stavax and Ramax from the scope of the 1973 dumping finding. Letter from Böhler-Uddeholm to Customs Technical

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[6] The six major end-use markets for stainless steel plate are the: (1) chemical process industry, (2) petroleum industry, (3) pulp and paper industry, (4) shipbuilding and marine industry, (5) water and desalination equipment, and (6) power generation equipment. Other significant uses for stainless steel plate include food and beverage processing equipment, textile manufacturing machinery and aerospace-aircraft equipment. Petition at 53–54.

[7] The petition included a list of price comparisons of the AISI 304 and 316 grades of steel in various thicknesses. The petition notes that the list provides only examples of injury to the domestic industry. Petition at 59.

[8] It is established that Bethlehem Steel and Crucible Steel manufactured plastic mold steel in 1976 as demonstrated by each company's brochures. There is no specific information as to whether either company manufactured plastic mold steel in 1973.

Branch at 160 (June 17, 1976); Pl.'s App., Ex. 13. Böhler-Uddeholm's letter presented two arguments. First, Stavax and Ramax were primarily stainless tool steels used for plastic molds. *Id.* at 161. Second, they did not compete with stainless steels in the AISI 300 series. Thus, Stavax and Ramax should be excluded from the scope of the class or kind of merchandise. In a letter dated November 16, 1976, Treasury excluded Stavax and Ramax from the 1973 dumping finding. Treasury concluded that Stavax and Ramax did not fall within the purview of the 1973 dumping finding "[i]nasmuch as the complaint failed to address itself to those varieties of steel, and based on the materials appended to [Böhler-Uddeholm's] memoranda * * *" Treasury/Customs Mem. at 170 (Nov. 16, 1976); Pl.'s App., Ex. 16. Treasury also noted Jessop's omission of AISI 400 grades of stainless steel in its price comparison.

On April 18, 1989, Böhler-Uddeholm sent a letter to Commerce questioning Customs' request for cash deposits for antidumping duties on Stavax and Ramax. On August 3, 1990, in a one-page letter, Commerce summarily affirmed Treasury's November 16, 1976 ruling that Stavax and Ramax were not subject to the 1973 antidumping duty finding. Letter from ITA to Böhler-Uddeholm at 172 (Aug. 8, 1990); Pl.'s App., Ex. 18.

C. *The Contested Administrative Proceedings:*

On July 27, 1993, the domestic industry requested that Commerce clarify the scope of the 1973 dumping finding with respect to Stavax, Ramax, and UHB 904L. The domestic industry asserted that Treasury's 1976 ruling unlawfully excluded these products from the scope of the 1973 finding.

Commerce issued its preliminary scope determination by letter on November 17, 1994. Commerce concluded that the 1976 Treasury decision unlawfully narrowed the scope of the 1973 dumping finding by introducing two new scope criteria: a requirement that the product be included upon the list of models or grades in the petition, and a requirement that the product have the same end use as the models or grades listed in the petition. Commerce also concluded that Treasury's 1976 decision incorrectly interpreted the lists of grades and uses in the petition underlying the 1973 finding to be "exhaustive." Accordingly, after discounting the two additional criteria and reinterpreting the scope of the class or kind of merchandise under its current standards, Commerce preliminarily concluded that the 1973 finding covered all grades of stainless steel plate with the chemical composition and dimension specified in the petition and tariff schedules for stainless steel.

On July 11, 1995, Commerce issued a final determination by letter ruling, including flat rolled Stavax and Ramax within the class or kind of merchandise encompassed by the antidumping finding on stainless steel plate from Sweden. Commerce issued a second letter ruling on November 2, 1995, on forged Stavax and Ramax. After applying the *Div-*

ersified Products[9] criteria, Commerce concluded that forged Stavax and Ramax were also within the scope of the original 1973 antidumping finding.

STANDARD OF REVIEW

In reviewing a determination by Commerce that imported merchandise is covered by an existing antidumping duty finding, the court "shall hold unlawful any determination * * * found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(1994).

DISCUSSION

I. *Commerce Has the Authority to Reexamine Legally Improper Treasury Scope Determinations:*

Commerce has the authority to clarify the scope of an antidumping finding, but this authority is not unlimited. *Mitsubishi Elec. Corp. v. United States,* 700 F. Supp. 538, 555 & n.3 (CIT 1988), *aff'd,* 898 F.2d 1577 (Fed. Cir. 1990). Commerce may "interpret the scope of a finding, [but] it cannot alter or amend that scope. Each stage of the statutory proceeding maintains the scope passed on from the previous stage."[10] *UST, Inc. v. United States,* 9 CIT 352, 356 (1985). It is equally well established that an agency may amend a determination when it has "utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake." *Badger-Powhatan, A Div. of Figgie Int'l v. United States,* 10 CIT 241, 244, 633 F. Supp. 1364, 1369 (1986); *Timken Co. v. United States,* 10 CIT 86, 90, 630 F. Supp. 1327, 1332 (1986); *Gilmore Steel Corp. v. United States,* 7 CIT 219, 223–24, 585 F. Supp. 670, 674 (1984). A contrary holding is tantamount to saying that "once an error initially evades detection, the ITA is thereafter powerless to take remedial steps, thereby compounding the error."[11] *Gilmore Steel,* 7 CIT at 224, 585 F. Supp. at 674. Commerce, however, may not execute a subsequently adopted policy under

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[9] *Diversified Prods. Corp. v. United States,* 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983), sets forth the scope criteria now found at 19 C.F.R. § 353.29(i).

[10] It is axiomatic that Commerce cannot alter an original scope determination that either includes or excludes certain merchandise with clear language. *Alsthom Atlantique v. United States,* 787 F.2d 565, 571 (Fed. Cir. 1986); *Fuji Elec. Co. v. United States,* 12 CIT 606, 611, 689 F. Supp. 1217, 1221 (1988). Here, plaintiff contends that the original finding clearly excluded plaintiff's stainless tool steel because Bethlehem Steel and Crucible Steel were excluded and omitted, respectively, from the domestic industry injury determination. Plaintiff argues that the absence of their two main competitors from the injury determination clearly indicates that the antidumping finding did not extend to their merchandise. If their merchandise was in fact covered, the two main competitors would have been included.

Plaintiff's argument is unpersuasive. It is not based on the clear language of the class or kind of merchandise description of the dumping finding and underlying petition, but rather rests upon an inference that must be made from the injury determination and evidence relating to competitors' production in later years. Necessity of the inference undermines plaintiff's reliance on *Fuji Elec. See Fuji Elec.,* 12 CIT at 611, 689 F. Supp. at 1219 (Treasury amended the antidumping proceeding notice to clarify the original finding to specifically include rectifier transformers as examples of the product under investigation; Commerce could not restrict scope thereafter).

[11] Plaintiff reads *Ericsson GE Mobile Communications, Inc. v. United States* and *Badger-Powhatan* very narrowly, contending that they limit Commerce to reviewing its own determinations. Pl. Reply Br. at 14; *Ericsson GE Mobile Communications, Inc. v. United States,* 60 F.3d 778, 782 (Fed. Cir. 1995); *Badger-Powhatan,* 10 CIT at 244, 633 F. Supp. at 1369. This view leads to a questionable result when Commerce is called upon to rectify an unlawful determination of its predecessor agency. As a practical matter, Commerce must be able to review incorrect antidumping decisions by Treasury. Otherwise the error cannot be cured, further compounding the problem. The reasoning of *Gilmore Steel,* 7 CIT at 223–24, 585 F. Supp. at 674, is as applicable to Commerce's review of Treasury's dumping decisions as it is to Commerce's review of its own. Moreover, in *Fuji Elec.,* the court stated that Commerce may clarify the scope of a prior

Continued

the guise of correcting inadvertent errors or remedying unlawful dumping findings. *See American Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958). If allowed to continuously revise prior decisions on the basis of new policies, an agency could amend endlessly, negating the finality of its decisions. *Badger-Powhatan,* 10 CIT at 245, 633 F. Supp. at 1369. Therefore, the court must determine whether Commerce's recent decision corrects a legally improper post-finding methodology, or whether it is simply an implementation of a new Commerce policy.

II. *Assessment of Treasury's 1976 Scope Ruling:*

Under the current law,[12] Commerce considers the descriptions of the merchandise contained in: (1) the petition, (2) the initial investigation, (3) the determinations of the ITA, and (4) the determinations of the ITC, to determine if the description itself is dispositive. 19 C.F.R. § 353.29(i)(1). Only if the description of the product is ambiguous will Commerce consider the four *Diversified Products* factors.[13] *Id.*

In the context of applying current law, Commerce concluded that Treasury's 1976 determination unlawfully narrowed the class or kind of merchandise in the original finding by adding two criteria: a requirement that a product must be included in the list of models or grades in the petition and a requirement that the product have the same end use as the models or grades listed in the petition. The court agrees that if Treasury imposed these tests as bright line additional criteria, then Treasury erred.[14] The petition listed the grades and uses of steel as "examples," implying the list was not intended as an exhaustive analysis of all stainless steel products.[15] In addition, the court in *Mitsubishi Elec.* explicitly stated that the petitioner "did not need to provide inclusive information covering all the categories and subcategories of all those goods included as like the class or kind of merchandise to be investigated." *Mitsubishi Elec.,* 700 F. Supp. at 559.

Nonetheless, Commerce erred when it went beyond these considerations and applied current standards. Treasury's post-finding ruling was a final determination. Changing the determination based on a new policy would negate such finality. *See Badger-Powhatan,* 10 CIT at 245, 633 F. Supp. at 1369. As indicated, as a matter of law Commerce cannot change a decision as a means to implement a new policy. *See American Trucking Ass'ns,* 353 U.S. at 146. A finding of error under the current standards could be mere pretext for applying a new policy to a prior deci-

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dumping finding, but cannot change the scope of the determination. 12 CIT at 611, 689 F. Supp. at 1221. In *Fuji Elec.*, the case involved a Treasury determination, a subsequent clarification by Treasury and, as here, a subsequent reexamination of the determination by Commerce. *Id.* at 610–11, 689 F. Supp. at 1219.

[12] Commerce currently makes scope determinations pursuant to 19 C.F.R. § 353.29(i).

[13] The four factors are: (1) the physical characteristics of the product; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the product; and (4) the channels of trade. 19 C.F.R. § 353.29(i)(2); *Diversified Prods.*, 6 CIT at 162, 572 F. Supp. at 889. *See also* 19 U.S.C. § 1677j (same factors utilized for analyzing later developed merchandise for anticircumvention purposes).

[14] It is not clear to the court exactly how Treasury considered these factors.

[15] In addition, classification of stainless steel by use is problematic. Kirk-Othmer 21 *Encyclopedia of Chemical Technology* 552 (3d Ed. 1983) (noting that classification of steel by use contradicts the standard industry practice, whereas classification of steel by chemical composition is preferred).

sion. In addition, it would be unfair to the participants to find that Treasury committed an error in the application of a policy not in existence at the time of the decision. Instead, the lawfulness of Treasury's post-finding ruling must be assessed under the law and attendant scope determination standards in effect in 1976.[16]

First, it appears that in 1976 Treasury applied the same factors in scope determination cases as applied in the classification case *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976).[17] In *Kyowa Gas Chemical Industry Co., Ltd. v. United States*, 7 CIT 138, 140, 582 F. Supp. 887, 889 (1984), *appeal after remand*, 7 CIT 311 (1984), when ordered in a § 751 review to apply the applicable criteria used in antidumping scope determinations, Commerce applied the same criteria as set forth in *Carborundum*. In footnote 2 of *Kyowa Gas*, the court noted that even prior to 1984,

> [i]n determining whether the 1976 antidumping finding on Acrylic Sheet from Japan encompassed [a product] * * * the Customs Service in *1978* considered these *[Carborundum]* criteria 'essential factors' to be used as 'guidelines' in making rulings on specific products.

Id. (emphasis added). It is clear that by 1978, and by inference 1976, that Treasury utilized the same totality of the circumstances test in antidumping scope determinations as set forth in *Carborundum*.

Second, the court notes that the 1976 standards are not identical to the standards applied currently. Specifically, the current threshold test of finding ambiguity in the documentary description of the merchandise as set forth under 19 C.F.R. § 353.29(i)(1) before resorting to *Diversified Products* or *Carborundum* type factors is not applicable under the 1976 standards. Neither party cites any support for the proposition that Treasury applied the threshold test in 1976. Moreover, the court in *Kyowa Gas* implies that Treasury *did not* apply the threshold test. *See* 7 CIT at 140, 582 F. Supp. at 889. As late as 1984, the threshold test was considered a recent invention of Commerce, implying that neither Commerce or Treasury had applied this test previously in antidumping scope determinations. *Id.* Specifically, the court in *Kyowa Gas* stated:

> [t]he Department qualifies the utilization of these [Diversified Products] criteria as a standard or test by conditioning their use upon a preliminary finding that the initial product description is "vague." Neither precedent nor authority has been submitted to

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[16] Because of this holding there is no need to address arguments relating to Commerce's 1990 affirmation of the 1976 Treasury determination.

[17] In *Carborundum*, the court found that it must consider all pertinent circumstances in classifying merchandise. *Carborundum*, 536 F.2d at 377; *Star-Kist Foods, Inc. v. United States*, 45 C.C.P.A. 16, 19 (1957). Specific, but not exclusive factors included: general physical characteristics of the merchandise, expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use if any in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. *Carborundum*, 536 F.2d at 377; *see also Maher-App & Co. v. United States*, 57 C.C.P.A. 31, 37 (1969)(Baldwin, J. concurring); *United States v. Baltimore & Ohio R.R. Co.*, 47 C.C.P.A. 1 (1959)(environment of the sale).

> substantiate the newly enunciated ITA standard * * *. The court is unable to accept this qualified application.

Id.

In addition, it would be impractical to apply today's threshold test based upon the evidence available in 1976. Under the current law, Commerce analyzes four documents in reaching its determination of whether the merchandise description is dispositive or ambiguous. 19 C.F.R. § 353.29(i)(1). In 1976, out of the four documents only the petition existed. Moreover, in 1976, Treasury did not publish an official definition of stainless steel plate as Commerce would do today; therefore any documents which might be analogous lacked an anchoring description. These facts suggest that Treasury would not have relied upon the petition definition as the dispositive factor in its antidumping scope determination, but instead it was merely one factor considered under the totality of the circumstances test.

Thus, the court remands this matter to Commerce. First, Commerce must apply the 1976 standards to determine whether Treasury erred in its post-finding ruling. In reviewing Treasury's actions Commerce must interpret ambiguous actions in accordance with the presumption of administrative legality and regularity.[18] Moreover, at this stage, Commerce may not reweigh the evidence. If a court would find sufficient evidence to sustain Treasury's decision, so must Commerce.[19] Second, if Treasury erred, Commerce may correct the antidumping scope determination by applying the law in effect in 1976.

Remand results are due within 45 days hereof.

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[18] In 1976, 28 U.S.C. § 2635 stated that "[i]n any matter in the Customs Court, the decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision." Thus, Treasury antidumping determinations, mainly appraisement and valuation decisions, were entitled to a presumption of legality and regularity. *See e.g., Maher-App & Co. v. United States*, 64 Cust. Ct. 598, 604 (1970) (the finding of foreign market value is presumed by statute (28 U.S.C. § 2633) to be correct; burden is on the plaintiff to establish by substantial evidence that foreign market values are erroneous.); *James C. Goff Co. v. United States*, 61 Cust. Ct. 506, 513 (1968).

The legislative history explaining the new provision 28 U.S.C. § 2639 further suggests that the presumption of legality and regularity applied in antidumping cases both before and after 1980. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 59, *reprinted in* 1980 U.S.C.C.A.N. 3729 at 3770 (28 U.S.C. § 2639(A)(1) applies the presumption of legality and regularity to judicial review in antidumping determinations under 28 U.S.C. § 1516a.). The House Report noted that § 2639 merely "restates the existing law" set forth in 28 U.S.C. § 2635. *Id.* Moreover, "the committee [did] not intend to impose a limitation on the presumption of regularity and legality which is normally accorded to actions of a Government agency or official." *Id.*

[19] The court in *Althsom Atlantique* imposed a similar standard of review upon ITA's § 751 review of a prior Treasury scope determination. *See Althsom Atlantique*, 787 F.2d at 571. The court noted that otherwise,

> the ITA [would be led] into an impossible task of reviewing de novo each and every Treasury antidumping determination to determine whether Treasury correctly included the article in question within the scope of its underlying antidumping determination * * *. [T]he ITA does not have the power to substitute its judgment for Treasury's when Treasury has specifically included an item within its antidumping determination.

Id. Similarly, here, Commerce may not impose its own judgment for Treasury's in reviewing the 1976 determination for error and must affirm the determination if supported by substantial evidence on the agency record.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/117 11/5/96 Aquilino, J.	Benteler Industries, Inc.	93–05–00287S	7304.90.7000–4 7.5%	8708.99.50 3.1%	Agreed statement of facts	Baltimore Tubular sections of BTR 110
C96/118 11/7/96 Aquilino, J.	Nidec Corporation	91–08–00616	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/119 11/7/96 Aquilino, J.	Nidec Corporation	91–11–00807	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/120 11/7/96 Aquilino, J.	Nidec Corporation	91–11–00835	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/121 11/7/96 Aquilino, J.	Nidec Corporation	91–12–00863	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Seattle Spindle motors
C96/122 11/7/96 Aquilino, J.	Nidec Corporation	92–02–00091	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/123 11/7/96 Aquilino, J.	Nidec Corporation	92–03–00171	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/124 11/7/96 Aquilino, J.	Nidec Corporation	92–10–00679	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors

ABSTRACTED CLASSIFICATION DECISIONS—continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/125 11/7/96 Aquilino, J.	Nidec Corporation	92–11–00767	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/126 11/7/96 Aquilino, J.	Nidec Corporation	92–12–00845	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/127 11/7/96 Aquilino, J.	Nidec Corporation	93–01–00018	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/128 11/7/96 Aquilino, J.	Nidec Corporation	93–04–00198	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/129 11/7/96 Aquilino, J.	Nidec Corporation	93–04–00215	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/130 11/7/96 Aquilino, J.	Nidec Corporation	93–06–00316	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/131 11/8/96 Aquilino, J.	Nidec Corporation	91–08–00574	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/132 11/8/96 Aquilino, J.	Nidec Corporation	91–08–00617	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors

C96/133 11/8/96 Aquilino, J.	Nidec Corporation	91–10–00748	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Seattle Spindle motors
C96/134 11/8/96 Aquilino, J.	Nidec Corporation	91–10–00766	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/135 11/8/96 Aquilino, J.	Nidec Corporation	92–04–00235	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/136 11/8/96 Aquilino, J.	Nidec Corporation	92–04–00279	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/137 11/8/96 Aquilino, J.	Nidec Corporation	92–05–00345	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/138 11/8/96 Aquilino, J.	Nidec Corporation	92–08–00540	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/139 11/8/96 Aquilino, J.	Nidec Corporation	92–10–00676	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/140 11/8/96 Goldberg, J.	Rienzi and Sons	93–11–00724, 93–12–00813	2005.90.95 17.5%	2103.20.40 13.6%	Agreed statement of facts	New York Tomato sauce
C96/141 11/8/96 Aquilino, J.	Seagate Technologies, Inc.	95–05–00720	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2%	Agreed statement of facts	Los Angeles Spindle motors, or parts (i.e., spindles, rotors or stators)

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